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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 898

KOHLER CO., *Petitioner*

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
and
NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Kohler Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 26, 1962.

Such judgment, Chief Judge Miller dissenting, affirmed those portions of a decision and order of the

National Labor Relations Board holding that Petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended, and remanded those portions of the order favorable to Petitioner to the National Labor Relations Board for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the separate appendix hereto as Appendix A.

Petitioner's motion to the Court of Appeals under Section 10(e) of the Act for leave to adduce additional evidence and the Court's denial thereof are printed in the separate appendix hereto as Appendix B.

The findings of fact, conclusions of law and order of the National Labor Relations Board in the unfair labor practice proceedings are included in the Joint Appendix (J.A. 8-412) [1] and are reported in 128 N.L.R.B. 1062-1259.

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[1] The reference "J.A." throughout is to the page number appearing at the bottom of the page of the Joint Appendix printed for the use of the court below, nine copies of which are filed herewith in accordance with Paragraph 4 of Rule 21. Where we do not contest the findings of fact made by the Examiner and the Board—and they are not, so far as we know, contested by the Union—we have, for convenience, made reference to these findings —rather than to the more voluminous evidence supporting the findings. The Decision and Order of the Board appears at J.A. 8-122, inclusive, and the Intermediate Report and Supplemental Intermediate Report of the Trial Examiner appears at J.A. 123-412 inclusive. All references to portions of the Trial Examiner's reports are findings adopted by the Board.

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Petitioner's motion to the Board for reopening to permit introduction of additional evidence, the Board's denial thereof, and Petitioner's motion for reconsideration (denied by the Board by telegram) [2] are printed in the Joint Appendix (J.A. 2005-2029).

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1962 (Appendix A hereto, p. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix C hereto, pp. 46a-50a.

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law contrary to the Fifth Amendment to the Constitution of the United States by the Board's finding that Petitioner violated the Act by making a three-cent wage increase on June 1, 1954, and the affirmance of that finding by the court below, when

(a) said date of June 1, 1954 was "pulled out of the hat,"

(b) was contrary to the date established by the pleadings, which date would not have supported the inferences of unfair labor practices drawn in this case.

(c) Petitioner's motions to the Board and to the Court for leave to adduce evidence that the date of

[2] Appendix F hereto.

the increase was, in fact, that established by the pleadings were denied.

2. Did the majority of the court below err in affirming the Board's finding that Petitioner had prolonged and converted the strike to an unfair labor practice strike by placing the three-cent wage increase into effect when such finding was a presumption not supported by any evidence and contrary to all the evidence in the case, i.e., repeated Union statements that it was striking for other reasons, without mention by the Union that the wage increase was a reason for the continuation of the strike.

3. Whether the majority below, by setting aside the Board's finding that the evidence as a whole does not support the allegation that Respondent was engaged only in surface bargaining prior to the strike, misapplied the standard of review laid down in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488, by "displac[ing] the Board's choice between two fairly conflicting views."

4. Does the Board have power to order the reinstatement of strikers discharged for acts of violence and coercion expressly proscribed by the Act?

STATEMENT

1. Pre-Strike Negotiations

In 1952 the United Automobile, Aircraft and Agricultural Implement Workers, AFL-CIO (the "UAW"), was certified by the National Labor Relations Board as bargaining agent for Petitioner's production and maintenance employees (J.A. 1950). In February of 1953 Petitioner, and the UAW and its Local Union No. 833 (hereinafter referred to

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jointly as the "Union"), made a collective bargaining contract, which, by its terms, expired on March 1, 1954 (J.A. 129). During 1953 the Union reopened the contract seeking a wage increase and agreement was reached on a three-cent per hour increase (J.A. 138).

Negotiations for another contract commenced early in February 1954 and continued until April 5, 1954, when the Union struck Petitioner's plant. Thereafter negotiations were held periodically (J.A. 132).

On March 7, 1954, the Federal Mediation and Conciliation Service was called in and all further meetings were with the assistance of conciliators from that Service (J.A. 132).

During the negotiations, both before and during the strike, Petitioner made concessions to the Union demands, and kept on the bargaining table complete contract proposals, periodically revised to incorporate agreements reached with the Union and proffered concessions, which Petitioner was prepared to execute.

Petitioner supported its positions concerning issues in dispute with the Union by arguments which, in the words of the National Labor Relations Board, were "legitimate and in the main reasonable. . . ." (128 N.L.R.B. at 1069; J.A. 19, 146)

The Union demanded a twnety-cent per hour general wage increase plus an added ten-cents per hour for "skilled trades workers," numerous and extensive changes in the 1953 contract, and also substantial changes in Petitioner's pension and insurance programs for employees (J.A. 2034-2035).

During the prestrike negotiations the area of disagreement was narrowed to seven basic issues; namely, union security, wages, seniority, pensions, insurance, arbitration, and a Union demand for a four per cent increase in incentive wages in Petitioner's enamel shop, denominated by the Union as "lunch allowance." (J.A. 141-142)

In February 1954 Petitioner offered a three-cent wage increase with Petitioner's contract proposal of that time, which proposal included agreements which had been reached with the Union. The Union rejected this offer.[3] (J.A. 16, 143, 2040)

2. The Post-Strike Period

The strike which began on April 5, 1954, because of the contract impasse, was characterized from its inception by a Union campaign of violence designed to prevent the operation of Petitioner's plant. See, *UAW* v. *W.E.R.B.*, 351 U.S. 266. From April 5 until May 28, 1954, the Union maintained illegal mass picketing, and an unlawful pass system, which shut the plant (J.A. 65-66). General Counsel for the NLRB stipulated that during this period Petitioner was not obligated to bargain with the Union (J.A. 182-183).

On May 21, 1954, the Wisconsin Employment Relations Board issued an order prohibiting the mass picketing and other unlawful Union conduct. The Union refused to obey the order until enforcement proceedings were begun on May 28, 1954. It then promised that it would comply (although it did not

[3] In 1953 Petitioner had granted the Union 15 cents in general wage increases and 6 cents in fringe benefit increases.

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do so), and on June 1, 1954, under the auspices of Federal Conciliators, negotiations were resumed (J.A. 186-187).

During the June 1954 negotiations Petitioner made additional concessions, including concessions regarding pensions, insurance and seniority. The Union conceded that "improvement" had been made in the contract (J.A. 187-188, 157-158, 161).

The Trial Examiner found that, apart from a three-cent wage increase, which he and the Board concluded Petitioner had placed in effect on June 1, 1954 to sabotage the negotiations, Petitioner might have claimed an impasse when it broke off negotiations on June 29, 1954 (J.A. 198).

That breakoff, which the Examiner and the Board found was justified by the Union's unlawful conduct, was caused by the fact that in June 1954 the Union stepped up its violence and vandalism against nonstrikers into a well-organized campaign (J.A. 201).

This continued throughout the strike, and included assaults on nonstrikers, dynamiting of nonstrikers' cars, paint bombings of nonstrikers' homes, vandalizing of nonstrikers' cars, and shotgun blasts through the windows of nonstrikers' homes. Petitioner's Exhibit 529, rejected as cumulative (J.A. 44) shows more than 800 acts of violence and vandalism against nonstrikers.

On August 4, 1954, at the request of the Federal Conciliators, negotiations again were resumed and discussion centered around the seven basic issues (J.A. 190). On August 10, 1954, the Union stated its position in writing, and on August 13, 1954, Peti-

tioner replied in writing to the Union demands, and all of the issues were discussed (J.A. 190-191).

In connection with the letter of August 10 the Union made it clear that all issues not stated in this letter had been dropped (J.A. 720, 669, 523). No mention was made in the letter of Petitioner's placing the three-cent wage increase in effect (J.A. 371-373).

During the August 1954 negotiations the Union fostered a series of demonstrations at the homes of nonstrikers which "reached scandalous proportions" and "constituted coercion and intimidation of nonstriking employees of the most flagrant type" (J.A. 202, 46). Because of these demonstrations, for which the Board found the Union responsible, Petitioner, on August 18, 1954, broke off negotiations.

Judicial proceedings in the Circuit Court of Sheboygan County, Wisconsin, then were begun to enforce the W.E.R.B. order, and on August 30, 1954, an injunction was issued against the Union (J.A. 192, 202).

Judge Murphy, who had issued the injunction, proffered his services as a volunteer mediator, and negotiations resumed September 1, 1954 (J.A. 192). Several negotiating meetings followed.

At the last joint meeting with Union representatives, Judge Murphy expressed his view that the *three basic issues* separating the parties were wages, arbitration and the return of strikers to work (J.A. 722, 2233-2234).

Mazey[4] "disagreed very sharply" with the Judge

[4] Secretary-Treasurer of the International Union and the highest ranking Union official to appear in the negotiations.

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and stated that *"the balance of the issues were still in the picture"* [5] and that the Union would *insist* on every striker being returned to his job, without discrimination (regardless of illegal misconduct) *"if a settlement were to be reached."* (J.A. 2234) This series of negotiations then terminated.

In the early winter months of 1954-1955 the Union began its coercive mass picketing at Petitioner's employment office (J.A. 251) which continued until the Local Union and 16 of its members were convicted of contempt of the injunction issued August 30, 1954, by Judge Murphy (J.A. 255-256; Appendix E hereto).

A negotiation meeting was held on January 4, 1955, under the auspices of the Federal Conciliation Service. The parties agreed that the seven major issues were "the things that are separating us from having a contract." (J.A. 204, 521)

At the request of the Federal Mediation and Conciliation Service, negotiating sessions were held July 27 to August 2, 1955 (J.A. 208).

Petitioner submitted two written settlement proposals which offered a general wage increase of five cents per hour (in addition to the three cents previously offered and placed into effect after it had been rejected) plus a further five cents per hour for nonincentive workers. It also reoffered all of its previous concessions (J.A. 2183-2187).

The Union rejected these proposals and insisted, as *a condition of settlement,* that Petitioner reinstate 90 strikers it had discharged for misconduct, including

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[5] Emphases throughout this petition are added unless otherwise noted.

12 concerning whom General Counsel for the Board had refused to issue a complaint (J.A. 1190, 1192).

On August 3, 1955, the Union held a membership meeting which rejected Petitioner's proposals (J.A. 209).

Petitioner then put the wage increase into effect on August 5, 1955, and notified the Union of its action (J.A. 209).

At all times during the negotiations, both before and after the strike, Petitioner had on the bargaining table one or more complete contract proposals it was willing to execute. The Union conceded that Petitioner's contract proposals were an "improvement" over the former collective bargaining contract (J.A. 187-188). Petitioner never withdrew any offer or concession it had made, including the three-cent wage increase.

3. The Discharges

Petitioner had given notice before the strike that it would not re-employ any employee "who engages in illegal conduct in the event of a strike." (J.A. 17, 66)

At a conference May 4, 1954, during the mass picketing, Petitioner gave notice that "many of these strikers aren't going to be hired back because of their acts" and Graskamp * replied, "You are going to take everybody back." (J.A. 740)

The matter of reinstatement of strikers guilty of illegal conduct came up again in the August 1954 negotiations, when the Union was fostering the home picketing, with the Union insisting that "everybody was

* Local Union President.

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going back to work with full benefit rights and without any discipline of any kind" (J.A. 2215), and again in the September 1954 negotiations (J.A. 196). The Union consistently maintained the adamant position that Petitioner would have to agree to reinstate everyone "without discipline of any kind" regardless of illegal conduct if a settlement were to be reached (J.A. 2215, 2234).

On February 18, 1955, the Union requested a list of employees who would not be re-employed because of violence during the strike (J.A. 2110-2111). On March 1, 1955, Petitioner responded with a list of 91 strikers it was discharging because of misconduct in connection with the strike (J.A. 2113-2115).[7]

The Board, after investigation, refused to issue a complaint on 12 of the discharges.

In the July-August 1955 negotiations the Union insisted—as a condition of settlement—on the reinstatement of all strikers guilty of illegal conduct specifically including the 12 discharged strikers on whom the Board had refused to proceed (J.A. 1190, 1192).

THE PROCEEDINGS BELOW

1. THE BOARD'S DECISION

(a) Conversion and Prolongation

The Board (Member Jenkins dissenting) held that the strike called by the Union at Petitioner's plant April 5, 1954, was an economic strike at its inception and was not caused by any unfair labor practice of Petitioner (J.A. 12, 30, 40fn. 40).

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[7] One discharge, Herbert C. Zimmerman, was later found to be due to an error in identification and was withdrawn.

However, the Board found that Petitioner placed a wage increase into effect on June 1, 1954, thereby violating Section 8(a)(5) and (1) of the Act. The Board also found, on the basis of the June 1 date, that the wage increase prolonged the strike, converting it in an unfair labor practice strike. This wage increase had been offered to, and rejected by, the Union prior to the strike.

The Board also found that Petitioner's allowing the employment of striking temporary Shell Department employees to terminate on July 1, 1954 (J.A. 40-41), upon termination of the contract with the government for the manufacture of shells, was an unfair labor practice which "contributed" to prolonging the strike (J.A. 41). This termination of employment was in accordance with both the collective bargaining contract and with notice given to the Union long before the strike.

The Board also found that by making the wage increase of August 5, 1955, Petitioner violated Section 8(a)(5) and (1) of the Act and that this "contributed" to the prolongation of the strike (J.A. 46).

Petitioner's actions in putting the two wage increases into effect and in allowing the employment of the Shell Department employees to terminate in accordance with their contract of employment were never mentioned by the Union as reasons why it was continuing the strike.

On the other hand, it stated and publicized its reasons for continuing the strike, i.e., its inability to obtain all the concessions it demanded on wages and the other major issues, and its insistence that Peti-

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tioner completely waive its right to discharge any striker guilty of illegal conduct. (J.A. 2203-2205)

Thus, the Board found the strike prolonged for reasons never stated or even adverted to by the Union and contrary to the reasons the Union itself gave.

(b) The Alleged Unfair Labor Practices

The complaint alleged, inter alia, that "on or about April 5, 1954" Petitioner put a wage increase into effect.[8] (J.A. 35, 1934-1935)

Petitioner's answer admitted that the wage increase was put into effect on April 5, 1954 (J.A. 35, 1971).

Although several amendments were made to the complaint in other respects (J.A. 125-126), the allegation as to the date of the increase was never changed. Petitioner was never given notice (prior to the issuance of the Examiner's Intermediate Report) of any claim that the date of the increase was other than April 5, and *no issue as to the date of the increase was ever litigated.*

In briefs to the Trial Examiner after the completion of the original hearing, counsel for both the NRLB and the Union stated that the increase had been put into effect on April 5, the first day of the strike, and *cited Petitioner's answer as establishing*

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[8] Although the Examiner finds that the wage increase was given "probably" on June 1—he lists his findings under the heading of "The Wage Increase of April 5" (J.A. 170), tacit recognition that the wage increase was actually put into effect on the date charged in the complaint and admitted in the answer, i.e., April 5, and he also refers to "the wage increase of April 5" as an "event" occurring between April and September (J.A. 170).

that date.[9] This clearly shows that all parties accepted the date of the increase as established by the pleadings and that no question as to the date of the increase had been litigated.

General Counsel conceded that the *evidence* did not establish the date of June 1 or any definite date (J.A. 36).

At the oral argument, after the hearing had been closed, the Examiner commented—

> "After all, it is pretty much of a matter in view of the record, and admission of counsel here, it is a matter of *pulling a date out of the hat.*" (J.A. 1889)

Nevertheless, the Examiner and Board found that the wage increase was given "shortly after May 28" and "*probably* on the first workday thereafter, i.e., June 1" (J.A. 35), and upon that speculation proceeded to erect a whole illusory facade of bad faith bargaining; holding—

> "Here the wage increase was given on or about the very time that the parties were renewing negotiations." (J.A. 38)
>
> "To secretly and unilaterally grant the wage increase *at that moment* was manifestly inconsistent with good faith collective bargaining. It disparaged the Union as the bargaining representative of Respondent's employees at a *critical time* when the plant was reopening and *when the parties were resuming negotiations.*" (J.A. 39)

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[9] Brief to Trial Examiner on behalf of Counsel for the General Counsel, April 20, 1957, p. 55; Brief of Charging Party before Trial Examiner, April 20, 1957, p. 15 (Appendix D hereto).

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> "In these circumstances [assuming the date of June 1] the Respondent must have reasonably understood that its actions tended to undermine the Union." (J.A. 39)

These findings would have been impossible if the *correct* date of April 5 (as charged in the complaint and admitted in the answer) had been found. That date was nearly two months before negotiations resumed. It also was at a time when, as General Counsel conceded and the Examiner and the Board found, Petitioner was *under no duty to bargain* because of the Union's illegal conduct of its strike (J.A. 182-183).

After Petitioner was apprised (by the Examiner's intermediate report) that there was a question as to the date of the wage increase, it filed a motion for reopening of the record to permit it to introduce evidence that the *actual* date of the wage increase was April 5, 1954, pointing out that it had not presented this evidence during the hearing because the date of the increase had been established by the pleadings and there was no issue or question as to the date (J.A. 2005-2018).

The Board, although it reopened on other matters and ordered a further hearing, rejected Petitioner's motion with respect to the date of the increase (J.A. 9, 2019-2021).

Petitioner filed a motion for reconsideration (J.A. 2022-2029) which was rejected by the Board by telegram on December 12, 1958. G. C. Ex. 1 UUUUU; (Appendix F hereto).

On April 26, 1961, after proceedings for review had begun in the United States Court of Appeals for the

District of Columbia Circuit, Petitioner filed a motion under Section 10(e) of the Act for leave to adduce additional evidence relative to the date of the wage increase. On May 22, 1961, the Court denied this motion without opinion. (Appendix B hereto).

The Board also found that Petitioner refused to bargain in violation of Section 8(a)(5) of the Act in September 1954 and thereby "contributed" to the prolonging of the strike (J.A. 43).

(c) Discharges

The Board sustained Petitioner's action in discharging 77 strikers because of their illegal and coercive conduct during the strike.

It found that these strikers were discharged for the reasons given by Petitioner, i.e., illegal and coercive conduct, and that Petitioner did not thereby violate the Act (J.A. 67-73). Accordingly, the Board, as required by Section 10(c) of the Act, dismissed that portion of the complaint against Petitioner (J.A. 83).

2. THE DECISION OF THE COURT OF APPEALS

The majority of the Court of Appeals, Chief Judge Miller dissenting, affirmed all of the Board's findings adverse to Petitioner. It also accepted the Board's findings regarding the misconduct of the 77 discharged strikers and the Board's findings that they had been discharged because of that misconduct.

Nevertheless, the majority of the court below set aside that portion of the Board's order which denied reinstatement to them, and remanded the matter of the 77 discharges to the Board for it to determine whether reinstatement would effectuate the policies of the Act.

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The majority sustained the Board's conclusions that Petitioner had refused to bargain with the Union, and by unfair labor practices had prolonged the strike, without discussing either the Board's disregard of due process of law or the other substantial questions of law presented to it by the Petitioner, stating only that:

> "We think they are amply supported by the record considered as a whole and that Kohler's attack must fail." (Appendix A hereto, p. 4a)

As Chief Judge Miller observed in his dissent below—

> "The majority opinion does not discuss case No. 16,182, which is Kohler's petition for review. . . ." (Appendix A hereto, p. 24a)

The Board's failure to apply the law correctly to facts established by uncontroverted evidence permeates all the Board's rulings against Petitioner. This, plus the denial of due process, was the gravamen of Petitioner's request for review by the court below. This is not a case in which the lower court was asked to review factual inferences drawn by the Board from conflicting testimony.

In this case, by refusing to apply principles of law applicable to facts established by undisputed documents, the uncontroverted testimony of Union witnesses, and, in many cases, by the Board's own findings, the Board concluded that Petitioner during the course of a strike, characterized by Union violence from its commencement, violated the Act and prolonged the strike. Commenting on this, Chief Judge Miller stated—

"On the basis of matters which I regard as trivia—feeble efforts of Kohler to protect itself against open warfare—the Board's order went largely against the employer. In ordering its enforcement, the majority opinion goes even further. I do not believe any purpose would be served by a detailed discussion of subjects not heretofore treated in this dissent; suffice it to say I disagree with the majority opinion. Its refinements of reasoning do not impress me as sufficient to justify its reward of the Union for unconscionable conduct. I would deny enforcement in No. 16,031, deny the Union's petition in No. 15,961, and grant the request of Kohler's petition for review in No. 16,182." (Appendix A hereto, p. 24a)

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE BOARD FOUND THAT IT HAD SABOTAGED NEGOTIATIONS AND CONVERTED THE STRIKE TO AN UNFAIR LABOR PRACTICE STRIKE BY GRANTING A WAGE INCREASE ON JUNE 1, 1954—A DATE CONTRARY TO THE DATE OF APRIL 5, 1954, CHARGED IN THE COMPLAINT AND ADMITTED IN THE ANSWER, WHICH DATE WOULD NOT HAVE SUPPORTED SUCH A FINDING—NO ISSUE AS TO THE DATE WAS EVER LITIGATED—AND PETITIONER WAS DENIED OPPORTUNITY TO PROVE THAT THE DATE OF THE INCREASE WAS ACTUALLY APRIL 5, 1954.

A. The Crucial Importance of the Date of the Increase

The complaint alleged, and Petitioner's verified answer admitted, that the three-cent wage increase was put into effect on April 5, 1954 (J.A. 124, 1971), the first day of the strike.[10]

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[10] The complaint was frequently amended, e.g., May 27, 1955, June 1, 1955, September 16, 1955, April 2, 1956 (disallowed by the Examiner but allowed by the Board) (J.A. 58). But the allegation as to the date of the increase was never changed.

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In consequence there was no issue as to the date of the increase, the timing of the increase was not litigated and the record evidence did not show the date when the increase was given (J.A. 171).

It was not until the Examiner's Intermediate Report found that the increase was given on June 1—a procedure which he himself characterized as "a matter of pulling a date out of the hat" (J.A. 1889)—that Petitioner was apprised of any question as to the date of the increase.

However, the date of the increase became of crucial importance when the Examiner and the Board made the *timing* of the increase the pivotal point of their decision and based their conclusions—not on the giving of the increase per se—but on the specific *timing* of the increase and concluded that the giving of the wage increase had been *deliberately timed* by Petitioner to sabotage the negotiations which were then reopening.

The Examiner commented with respect to what he termed "the unilateral granting of a wage increase on or about June 1":

> "It was *only the latter which was directly connected with and which affected the course of the contract negotiations in June and thereafter. Aside from it,* and on the surface, the negotiations proceeded in June with the indicia of good faith, i.e., with concessions, counter-proposals, and changes on major as well as on minor issues. Indeed, but for its position on the *wage issue,* Respondent might well have relied on its claim of impasse at the time of the breakoff." (J.A. 198; see also J.A. 361)

The Board's finding of bad faith on the part of the Petitioner is based on the premise that the wage increase was given "at a critical time when the plant was reopening, and when the parties were resuming negotiations," and that a wage increase "at that moment" (J.A. 39) was inconsistent with good faith bargaining.

Thus, the timing of the three-cent increase was critical to all of the findings adverse to Petitioner. In effect, the Board held that from June 1, 1954, forward Petitioner was seeking to avoid agreement rather than to achieve a setlement, and all of Petitioner's conduct subsequent to the June 1 date was appraised in that context and on that basic assumption. All findings by the Board of unfair labor practices "thereafter" flow from, and are premised on, this initial assumption that Petitioner deliberately timed the wage increase to sabotage negotiations, a finding made without due process of law. The Board's finding of prolongation also is geared to this holding. In the eyes of the Board, Petitioner's action of "June 1" was the basic cause of prolongation, to which the later unfair labor practices found by the Board merely "contributed."

Dissenting below, Chief Judge Miller emphasized the significance of the date in these words:

> "The strike which began April 5, 1954, was caused, the Board found, by a disagreement over contract terms, and not by Kohler's refusal to bargain which the Union alleged. But the Board also found that the strike was prolonged by Kohler's unilateral grant of a three-cent wage increase, which it said occurred June 1, 1954. Thus, after that date the continuance of the

strike was held to be due to this alleged unfair labor practice on the part of Kohler. This is the significance of the date of June 1, 1954, which I promised in footnote 2 I would explain." (Appendix A hereto, p. 23a)

The Board's findings would have been impossible had the actual date of April 5, 1954, been found, since that date was nearly two months removed from the "critical time" when negotiations resumed, and the Board found that the Petitioner was under no obligation to bargain on April 5, 1954, because of the Union's flagrantly illegal conduct of the strike (J.A. 183).

B. The Denial of Due Process

The purpose of pleadings is to narrow the issues on which evidence must be introduced. This fundamental principle is set forth in the Board's rules:

> ". . . all allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge *shall* be deemed to be admitted to be true and *shall* be so found by the Board, unless good cause to the contrary is shown." [11]

Therefore, when the complaint alleged a wage increase on April 5, 1954, and the Petitioner admitted by verified answer that April 5, 1954, was the date on which the wage increase was made, the date was fixed and no evidence to substantiate the date was required.

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[11] NLRB Rules & Regulations, Series 8, 29 C.F.R. Sec. 102.20 (1959). Text appears in Appendix C hereto, p. 51a.

Chief Judge Miller in his dissent also concluded:

> "I do not think the Board had the right to make this finding. The complaint alleged and Kohler's answer admitted that the wage increase was put into effect on April 5, so there was no issue as to the date presented for decision. . . ." (Appendix A hereto, p. 23a)

Yet the Examiner by a method he himself characterized as a "matter of pulling a date out of the hat" (J.A. 1889) [12] found that the wage increase was made on June 1, 1954 and the Board concurred.

Can the Board go outside the scope of the pleadings and the evidence to pull "a date out of the hat"? Whose hat? Not the General Counsel's, not the Union's, not the Petitioner's.

This conflicts with the requirements of procedural due process. In *Consolidated Edison Company* v. *NLRB,* 305 U.S. 197, it was declared by this Court that a finding of an unfair labor practice may not be sustained where the unfair labor practice was not charged in the complaint or litigated.

Recently, in a situation analagous to the instant case, *NLRB* v. *Fletcher Co.,* 298 F.2d 594 (1st Cir.), the Court held—in direct conflict with the majority below—

> "Before the Board and here on appeal, the Company contended that the matter of its asserted refusal to recognize and bargain with the Union on and after February 10, 1960, was not properly in issue because such violation was never alleged

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[12] This comment was made *after* all the testimony and the colloquies now relied upon by the Board to support its decision.

in the complaint. In this contention, respondent is assuredly correct, for the complaint is totally devoid of any allegation which would put it on notice that the reasonableness of the post-settlement time interval was challenged. Consequently, respondent presumably had every legitimate reason to believe that the question of whether or not a reasonable time had elapsed was not one of the issues in the case. . . .

"At the conclusion of the opening statement there occurred a colloquy between counsel for General Counsel and the Trial Examiner which confirmed this exclusivity of issue, and, thereafter, at no time during the course of the hearing was there any contention made that respondent's refusal to recognize the Union beyond February 10, 1960, constituted a violation of Section 8(a)(5) and (1).[13] In sum the Board made a finding of a violation which was neither charged in the complaint nor litigated at the hearing.

"We believe that it would derogate elemental concepts of procedural due process to grant enforcement to such a finding. As was stated in Douds v. International Longshoremen's Ass'n., 241 F.2d 278, 283 (2d Cir. 1957):

> " 'The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case,

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[13] In the instant case a direct parallel to this colloquy is found in the fact that the Brief to Trial Examiner on Behalf of Counsel for the General Counsel, April 19, 1957, at 55, and the Brief of Charging Party, April 20, 1957, at 15 (Appendix D hereto) submitted after the close of the hearing, both take the position that the wage increase was made on April 5, 1954. Clearly there was no notice to Petitioner that the date of April 5 was in question.

and to set a standard of relevance which shall govern the proceedings at the hearing.'

"Where the Board improperly makes its finding on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement, see NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951)."

In *NLRB v. Fulton Bag & Cotton Mills,* 175 F.2d 675 (5th Cir.), the Court held a finding on an unfair labor practice not charged in the complaint "shocking to the fundamental conception of justice" even though no penalty was assessed for such unfair labor practice. Here, the result of the Board's decision is to "punish as well as condemn" on the basis of a finding of a violation never charged or litigated. See also *NLRB v. Reliable Newspaper Delivery Inc.,* 187 F.2d 547, 550, n.4 (3d Cir.); *NLRB v. Burns,* 207 F.2d 434, 436 (8th Cir.); *NLRB v. Kanmak Mills,* 200 F.2d 542 (3d Cir.).

The initial denial of due process was compounded when, after the filing of the Intermediate Report (which for the first time, informed Petitioner that there was any question as to the date of the wage increase) Petitioner's motion before the Board for leave to adduce evidence to prove that the date of the increase was, in fact, the date established by the pleadings was denied.[14] It was further compounded when Petitioner's motion to the court below under Section

[14] The Board did reopen the hearing on other matters (J.A. 9) and the proffered proof could have been received without causing any delay in the eventual disposition of the case.

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10(e) of the Act for leave to adduce evidence as to the actual date of the wage increase was denied.

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States,* 304 U.S. 1, 18

It is basic law that a refusal to hear material evidence is a denial of due process. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197; *NLRB v. Capital Fish Company,* 294 F.2d 868 (5th Cir.); *NLRB v. Tennessee Carolina Transportation Inc.,* 226 F.2d 743 (6th Cir.); *NLRB v. Burns, supra.*

Thus, in two respects the actions below conflict with the requirements of due process as defined by this and other courts.

Substantive rights are no more than abstract principles when the procedural due process necessary to establish those rights is denied. Such due process has been denied Petitioner.

II. THE BOARD FINDING THAT PETITIONER PROLONGED THE STRIKE BY GRANTING THE THREE CENT INCREASE WAS ERRONEOUS AS A MATTER OF LAW.

The Board found that the strike began as an economic strike, caused by an impasse concerning the economic and contract demands of the Union. However, by making the 3 cent increase, which it found Petitioner effectuated on June 1, 1954, the Board, concluded Petitioner thereafter prolonged the strike and converted it into an unfair labor practice strike.

The courts uniformly have ruled that the Board may not find that an employer's unfair labor practices

have prolonged an economic strike, thereby converting it into an unfair labor practice strike, unless there is proof of the causal relationship between such unfair labor practices and the prolongation of the strike. *NLRB v. Jackson Press, Inc.,* 201 F.2d 541, 546 (7th Cir.); *NLRB v. James Thompson & Co.,* 208 F.2d 743, 749 (2d Cir.); *NLRB v. Scott & Scott,* 245 F.2d 926, 929-930 (9th Cir.); *Winter Gardens Citrus Products Cooperative v. NLRB,* 238 F.2d 128, 129 (5th Cir.).

The settled state of law is recognized in the Board's Nineteenth Annual Report (p. 86), where it says, ". . . an economic strike will be held to have been so converted [to an unfair labor practice strike] only if there is a causal relationship between the employer's unfair labor practice and the continuing strike."

Here there was no evidence that Petitioner's actions in fact prolonged the strike and the Board engaged in a presumption that they did despite substantial uncontroverted evidence showing that the Union continued the strike for other reasons.

The undisputed evidence shows that the Union acquiesced in Petitioner's action with respect to the 3 cent wage increase. The Union had notice of such action (J.A. 171) and never protested it. It continued to bargain on wages and to demand a further wage incresae. It took cognizance of the 3 cent increase and treated it as an offset to, or downpayment on, its further wage demands (J.A. 194).

It is pertinent to note, therefore, that the Board has ruled that where a Union does not protest an employer's unilateral action it is deemed to have acquiesced therein. *White Motor Co.,* 111 N.L.R.B. 1272,

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1285-1286; *The Frohman Mfg. Co., Inc.*, 107 N.L.R.B. 1308, 1314; *Allis Chalmers Mfg. Co.*, 106 N.L.R.B. 939, 949, *enforcement denied for other reasons*, 213 F.2d 374, (7th Cir.).

Furthermore, the uncontroverted evidence shows that the Union at all times conditioned termination of the strike upon Petitioner's granting much larger wage concessions and other demands by the Union.

On its radio broadcast on June 12, 1954, the Union stated "We don't intend to liquidate this strong strike just on the pittance which has been presented across the bargaining table in the last few days." (J.A. 2197-2198).

The Daily Strike Bulletin of August 1, 1954, entitled "Why Are The Kohler Workers Striking" (J.A. 2203-2205), lists seniority, arbitration, automatic wage progression, pension, insurance, union security and wages and inequities as reasons "why the Kohler workers are striking."

On August 10, 1954, the Union sent the Company a letter which stated that it "hereby modifies its monetary and contractual demands . . ." (J.A. 371; J.A. 2102).

The letter listed the "matters still in dispute" as (1) General wage increase of 10¢ plus 5¢ for certain "skilled workers" retroactive to March 1, 1954, and establishment of "procedures" to resolve any existing inequities; (2) non-contributory pension plan; (3) specified "improvements" in hospital-medical insurance; (4) arbitration; (5) seniority; (6) maintenance of membership; and (7) 4 percent lunch time allowance in Enamel Shop and for Pottery Dry Finishers.

In connection with this letter Emil Mazey, Secretary-Treasurer of the International UAW and the highest ranking Union official to appear in the negotiations, testified:

> Q. "Now, did you have occasion to participate in a meeting with the company on August 10th? (1954). A. "Yes, I did. I presented the letter to Mr. Conger, and I explained what the letter meant. We had reduced our demands to seven demands, and I explained each demand in detail. I further advised the company that in making this revision of our demands that all the other issues that had not already been resolved, *that the union was dropping its demands on the remaining issues.*" (J.A. 720)

Other Union witnesses corroborated this testimony. (J.A. 669-670; J.A. 522-523).

On August 16, 1954, the Union by letter advised the Company that—

> "... at a special Local 833 Membership meeting held Sunday afternoon, August 15, 1954, it was voted overwhelmingly to reject your most recent offer dated August 13, 1954, and to *continue the strike until a decent contract is won.*" (J.A. 2206).

In a speech to the Union's membership, reported in the "Kohlerian" [15] of August 19, 1954 Mazey stated—

> "So it seems to me we have one of two choices to make in this matter, and in the final analysis, I'm not going to make that choice but you're going to make that choice.

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[15] The Union's official newspaper.

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"One, we can accept the company's proposal, or, we can continue to fight *until we get a decent and honorable collective bargaining agreement.* Those are the two choices." (J.A. 2215)

On June 7, 1955, Burkart, International Representative of the UAW and chief negotiator when higher-ranking officers were not present, testified that the issues which caused the strike were the factors still prolonging the strike as of that date. His testimony follows—

A. ". . . we agreed to get on to what he had considered the major matters in the contract. Those major matters constitute in the main the seven points *which are on the bargaining table* to this date . . .

Q. "Would you name them?

A. "I will endeavor to: Arbitration, pensions, insurance—that is, life, hospitalization and medical insurance—union security, seniority, wages, and the lunch period for workers in the enamel shop." (J.A. 142; J.A. 462-463).

On June 8, 1955, he testified—

Q. "(By Mr. Conger) Now, you mentioned in your direct testimony that there are still seven issues remaining?

A. "Yes, sir.

Q. "Arbitration; Pensions; Insurance; Union Security; Seniority; Wages; Lunch Period in the Enamel Shop?

A. Yes, sir.

Q. "Those are the things that *are still holding up the signing of a contract are they not?*

A. Yes,—plus the return to work, now, of course. This is an added thing since that time which did not come out in the testimony.

Q. "Well, let me ask you, before the question of return to work came up, those were *the things that were preventing a contract, were they not?*

A. "That is right, sir.

Q. "And you were insisting on a contract being settled *before you called off your strike and returned to work,* is that correct?

A. "Yes, this is right." (J.A. 549-550).

On June 15, 1955, Mazey testified—

"There are 7 basic contractual matters that affect wages and contracts, and during the course of these current hearings the company fired 90 workers, so that there are 90 workers and 7 contractual issues involved in the dispute." (J.A. 733).

He also testified—

Q. "With reference to a meeting of September 28 or 29, I think you stated that you disagreed sharply with Judge Murphy that wages, arbitration, return of strikers to jobs, were the main issues in dispute.

A. "That is correct. *I did disagree very sharply.*

Q. "You mentioned the other issues. Are those the *familiar 7 issues* that I think you have testified to before?

A. "Yes, there were *7 issues at that time.* There are now 97 issues, Mr. Conger." (J.A. 731).

The "Kohlerian" of September 23, 1954 (J.A. 2216) stated—

"We can tell the company, as we said at the beginning of this strike, *we will hold out until we get a decent contract—and not one second sooner.*

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At a negotiation meeting on January 4, 1955, Petitioner and Union were in agreement that these seven issues were separating them from a contract, and prolonging the strike (J.A. 204; J.A. 521; J.A. 523).

General Counsel called 37 of the striking employees to testify as to their reasons for going on strike and remaining on strike.

Uniformly they testified that their reason for remaining on strike was the same as for going on strike, to get a "decent contract" and that they were staying out because the Petitioner had not met the Union's contract and economic demands.

Thus the Union repeatedly stated its reasons for continuing and prolonging the strike.

Not once did it mention the Petitioner's action in putting the 3 cent wage increase into effect.

It is also significant that the Union's original charge (filed July 12, 1954) *did not mention* Petitioner's actions in placing the 3 cent wage increase in effect. (Appendix G hereto).

The uncontroverted evidence thus precluded the Board from properly finding that the strike was prolonged by Petitioner's actions. *Dickinson* v. *United States,* 346 U.S. 389; *Chesapeake & Ohio R. Co.* v. *Martin,* 283 U.S. 209. It compels the conclusion that the "character, status and motivation" of the strike remained the same as it was when the strike began. *NLRB v. James Thompson & Co.,* 208 F.2d 743, 749 (2d Cir.). And see also *NLRB v. Lightner Publ. Corp.,* 113 F.2d 621, 625, (7th Cir.) in which the court, holding that the Board could not reject the reasons given by a union for striking and find that the strike was conducted for other reasons, stated,

". . . there is no evidence in the record to explain the Board's refusal to accept the employees' statement of their reasons for striking."

In this case the Board's finding that Petitioner prolonged the strike by placing the 3 cent wage increase in effect rests upon its affirmance that both Petitioner and the Union were "outguessed by the Trial Examiner in finding their true purpose in walking out." *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 464 (2d Cir.) in which the Court held that an employer could not be held guilty of an unfair labor practice on the basis of such a "guess" contrary to the evidence. See also *NLRB v. Reynolds International Pen Co.*, 162 F.2d 680, 684 (7th Cir.) and *NLRB v. Washington Aluminum Co.*, 291 F.2d 869, 877 (4th Cir.), *certiorari* granted December 4, 1961.

Moreover, the Board ignores the undisputed fact that the increase was not placed into effect until after a strike had been called.

An employer has a right to put a wage increase, particularly one that has been offered to and rejected by the union, into effect after a strike is called in order to protect and continue its business.

Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106, 109 (6th Cir.); *NLRB v. Lewin Mathes Co.*, 285 F.2d 329, 332 (7th Cir.); *NLRB v. Potlatch Forests*, 189 F.2d 82, 86 (9th Cir.); *Celanese Corp. of America*, 95 N.L.R.B. 664, 667 n.6; *The Texas Company*, 93 N.L.R.B. 1358, 1362. See also General Counsel's Ruling in *Case No. SR-494* June 23, 1960 (46 LRRM 1253-1254).

Furthermore, the uncontroverted evidence shows that throughout the strike the Union adamantly in-

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sisted that it would not end the strike unless Petitioner would agree to reinstate strikers who had engaged, and were engaging, in unlawful misconduct coercing nonstrikers. After May 1954, when Petitioner informed the Union that such strikers would not be reinstated, the undisputed evidence shows that the Union's insistence as a condition precedent to any settlement that Petitioner make such an agreement caused the continuation of the strike. See pp. 10-11, *supra.*

The Board's rejection of the Union's repeated declarations why it was continuing the strike in favor of the presumption that it was prolonged by Petitioner's actions conflicts with numerous decisions holding that findings contrary to undisputed evidence are erroneous as a matter of law. *United Wholesale & Warehouse Emp. v. NLRB,* 282 F.2d 824, 827 (D.C. Cir.); *Pittsburgh-Des Moines Steel Co. v. NLRB,* 284 F.2d 74, 87 (9th Cir.); *Farmers Co-operative Co. v. NLRB,* 208 F.2d 296, 299 (8th Cir.); *United States Steel Corp. v. NLRB,* 196 F.2d 459, 464 (7th Cir.); *Boeing Airplane Co. v. NLRB,* 140 F.2d 423, 433 (10th Cir.); *Quaker State Oil Refining Corp. v. NLRB,* 119 F.2d 631, 632 (3rd Cir.); *Martel Mills Corp. v. NLRB,* 114 F.2d 624, 627-628 (4th Cir.); *Ballston-Stillwater Knitting Co. v. NLRB,* 98 F.2d 758, 760 (2d Cir.).

Where as here the uncontroverted evidence opposed to the finding made by the Board has been ignored, in favor of a contrary presumption, there is error of law which requires reversal of the finding. *Universal Camera Corp. v. NLRB,* 340 U.S. 474; *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105.

The Board's erroneous finding that the strike was prolonged, and converted into an unfair labor practice strike, by Petitioner's action placed a statutory cloak of protection against replacement around strikers who were striking to force the Petitioner to accede to a demand which under the Act Petitioner could not be required to grant.

An employer has an absolute right to discharge or to refuse reinstatement to strikers who engage in violent misconduct such as that found by the Board in this case, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 254 and an employer is not required to bargain with a striking union concerning the exercises of that right. *National Carbon Div., Union Carbide & Carbon Corp.*, 100 N.L.R.B. 689, 695; Act, Section 10(c).

In *NLRB v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342, this court ruled that an employer or union which makes agreement on a matter which is not a mandatory subject of bargaining under the Act a condition precedent to a contract violates the collective bargaining obligation. See also *Local 164 Bhd. of Painters v. NLRB*, 293 F.2d 133, 134, 135 (D.C. Cir.); *International Longshoremen's Ass'n. v. NLRB*, 277 F.2d 681, 683 (D.C. Cir.); *NLRB v. Local 19, Int'l Bhd. of Longshoremen*, 286 F.2d 661, 664 (7th Cir.); *NLRB v. International Bhd. of Electrical Workers*, 266 F.2d 349, 350 (5th Cir.) *NLRB v. Dalton Telephone Co.*, 187 F.2d 811, 812 (5th Cir.) *cert. den.* 342 U.S. 824; *NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 88-89 (4th Cir.)

This principle is applicable here, where the Union made the execution of a contract and termination of

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the strike dependent on Petitioner's agreement to surrender its right to discharge, or to refuse to reinstate, strikers engaging in the unlawful misconduct. *Wilson & Co. v. NLRB,* 120 F.2d 913, 925 (7th Cir.); *NLRB v. Pecheur Lozenge Co.,* 209 F.2d 393, 403-404 (2d Cir.); *Hartsell Mills Co. v. NLRB,* 111 F.2d 291, 292 (4th Cir.).

The question presented, therefore, involves the important problem whether the Board properly may find that an employer is responsible for prolonging a strike when the undisputed evidence shows that the Union has continued the strike to force a surrender of the right not to re-employ strikers who engage in coercion and violence contrary to the specific provisions of the Act. Under such circumstances, we submit, the Board may not tax an employer with prolongation.

The practical effect of such a ruling is to allow a Union to sponsor, foment and continue a violent strike, as the Union did in this case, and at the same time to immunize strikers who actively support such a program against replacement. This construction is diametrically opposed to the declared purposes of the Act to outlaw violence and coercion and to promote the lawful and peaceable resolution of labor disputes.

This Court heretofore has not considered the scope of the Board's power to hold an employer responsible for prolonging and converting an economic strike into an unfair labor practice strike or the question whether a striking union's insistence upon a condition precedent outside the scope of mandatory bargaining can be ignored in assessing responsibility for prolongation. We submit that the question here presented, be-

cause of its impact upon the administration of the Act in strike situations merits review by this Court.

The Alleged Unfair Labor Practices Subsequent to June 1, 1954

As we have pointed out heretofore, all findings of unfair labor practices subsequent to June 1, 1954 are premised on and flow from the Board's basic presumption that from June 1, 1954 on Petitioner was bargaining to avoid rather than to reach agreement and that this constituted a "continued refusal to bargain." (J.A. 42)

And the Board did not find that these alleged unfair labor practices independently prolonged the strike but only that they "contributed" to its prolongation (J.A. 41, 42, 43, 46).

For that reason those portions of the Board's Decision and Order adverse to Petitioner cannot stand independently from the "June 1" finding, and they are not discussed.

III. THE MAJORITY BELOW ERRED BY SETTING ASIDE THE BOARD'S FINDING THAT THE STRIKE WAS AN ECONOMIC STRIKE AT ITS INCEPTION AND DIRECTING RECONSIDERATION THEREOF.

The majority below remanded the Board's finding, (member Jenkins dissenting) that—

> ". . . the evidence as a whole does not support the allegation that Respondent was engaged only in surface bargaining prior to the strike." (J.A. 20; see also J.A. 12).

for reconsideration and with implied instructions to alter that finding and find that Petitioner did engage only in surface bargaining prior to the strike.

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The majority accepted the Union's contention that "the Board viewed the negotiations in isolation, ignoring" the background evidence pointed out by the Union (Appendix A hereto, p. 12a).

The Board's decision specifically refutes this claim and makes it clear that the Board did not *ignore* this evidence but, on the contrary, *expressly considered it* and found it refuted by the other background evidence and by the undisputed facts as to the negotiations themselves.

The Board expressly stated that:

> "In reaching this conclusion the Board is not unmindful of the background evidence, pointed to by the General Counsel and the Union . . ." (J.A. 12)

Answering the contention of dissenting Member Jenkins, which was to the same effect as that of the majority below, the Board said—

> "Contrary to Member Jenkins' assertions in his separate opinion, we have carefully considered the 'whole record' in this proceeding and have studiously assessed the Respondent's entire course of conduct before and after the commencement of the strike on April 5, 1954, in reaching our conclusion that the strike was economic at its inception . . ." (J.A. 40 n. 40)

The Board also considered its prior determination of violations[16] by Petitioner and found that

> "These violations were remedied in accordance with the Board's Order." (J.A. 13 n. 7).

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[16] Kohler Co., 108 N.L.R.B. 207. It is noteworthy that Petitioner has never, prior to this case, been found guilty of a refusal to bargain in violation of Section 8(a)(5).

However, as was its statutory duty, the Board considered the *entire* background evidence including prior negotiations which had resulted in agreements on two different occasions, viz., a contract which the Union had referred to as a "good" one and one "we accept with pride" and an agreement for a wage increase on reopening of that contract (J.A. 14).

It said

> "It is against this background of two successful series of negotiations that the Board must view the 1954 negotiations." (J.A. 15)

The Board considered, not only the "background" but also the *foreground,* i.e., the actual 1954 pre-strike negotiations, and the concessions offered by Petitioner, and found

> "Thus, the bargaining demands of both parties were thoroughly explored. Some agreements on contract proposals were arrived at. Some areas of disagreement were narrowed. The record also shows that the positions taken by the Respondent on the bargaining demands of the Union were supported by legitimate and, in the main, reasonable arguments." (J.A. 19)

and that the "background" evidence singled out by the Union was

> ". . . amply refuted by the undisputed facts concerning the negotiations and the results of the collective bargaining during 1952 and 1953." J.A. 13)

Moreover, contrary to the majority's suggestion that the Board did not consider whether the remarks made to Petitioner's employee Majerus "reflected

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upon the Company's good faith" (Appendix A hereto, p. 14a) the Board did consider the effect of these matters on the bargaining and stated—

> "Morevoer, after considering the record as a whole, including the remarks made to Majerus, we have already concluded that the Respondent was in fact bargaining in good faith at all times prior to the strike, and we cannot find, on the basis of the record, that the remarks were calculated to undermine the Union's position in bargaining for a new contract." (J.A. 51 n. 50)

Thus, the Board made its finding that Petitioner bargained in good faith prior to the strike by weighing the conflicting evidence, and it decided that the inference to be drawn from all of that evidence was that Petitioner bargained in good faith.

The Board's findings in this respect may not be disturbed by a reviewing court since they are based—not on speculation dehors the record—but on substantial evidence on the record considered as a whole.

As this Court said in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488, a reviewing court may not "displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo."

The majority of the court below erred in ignoring this basic limitation on their power of review.

This basic limitation on the court's power of review may not be exceeded by holding that the Board "ignored" evidence which its decision clearly shows it *considered* and found outweighed by other evidence.

The majority's statement that this evidence was ignored is clearly inconsistent with their statement

> "But the Board found that these inferences were 'refuted' by Kohler's subsequent conduct." (Appendix A hereto, p. 13a)

Evidence cannot be both "ignored" and expressly found to be "refuted."

The plain intendment of the majority opinion is that although the Board expressly considered the evidence singled out by the Union and assessed the weight to be accorded to it in view of the opposing evidence, the majority would have weighed it differently and, "ignoring" the opposing evidence, have reached a different conclusion—that the majority would have weighed the evidence as did dissenting member Jenkins.

The majority correctly states the law when it says "We do not, of course, purport to assess the weight to be accorded these events. That is the Board's task." (Appendix A hereto, p. 15a).

But it errs by ignoring the fact that the Board *did* perform that task. It considered and weighed the background evidence cited by the majority below and found it outweighed by other background evidence and by the undisputed facts relating to the negotiations themselves.

This Court has recently affirmed the doctrine of *Universal Camera* that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it de novo." *N.L.R.B.* v. *Walton Manufactur-*

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ing Co., U.S. , 30 U.S. Law Week 4279, decided April 9, 1962.

Involved there was the same basic question presented here, i.e. the right of a reviewing court to substitute its choice of inferences from conflicting evidence for those of the Board. The permissible scope of review is the same, whether the finding is in favor of or adverse to a union. The question presented is an important one in this case because, as the majority below noted, it materially affects the scope of the Board's reinstatement order.[17]

IV. THE BOARD HAS NO POWER TO ORDER THE REINSTATEMENT OF STRIKERS DISCHARGED FOR VIOLENCE AND COERCION EXPRESSLY PROSCRIBED BY THE ACT.

The question whether the Board has power under the Act to reward and encourage acts of coercion and violence in violation of the specific proscriptions of the Act by ordering reinstatement of those guilty of such acts is an important one in the administration of the Act.

Implicit in the remand to the Board by the majority below are two propositions: first, that violent and coercive conduct which violates the specific proscription of Sec. 8(b)(1)(A) may not constitute cause for discharge within the meaning of Sec. 10(c); and second, that the Board is empowered to find that employer unfair labor practices may justify employee resort to violence and coercion although peaceful and legal remedies are provided by the Act for such employer unfair labor practices.

Each proposition is, we submit, of major importance in the administration of the Act. If employees

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[17] See Appendix A hereto, p. 5a.

may resort to violence and coercion without loss of the Act's protection, it is inevitable that the Act's peaceful processes for the determination of unfair labor practices will be bypassed in favor of more violent ones.

Unless these propositions are sound, the majority below has remanded the case to the Board with instructions to exercise a power that the Board does not have.

The employee misconduct[18] in this case consisted of (a) mass picketing which completely prevented ingress and egress to Kohler's plant during the months of April and May, 1954, (b) demonstrations at the homes of nonstrikers,[19] and (c) mass picketing of Petitioner's employment office,[20]—conduct clearly proscribed by Sec. 8(b)(1)(A) of the Act.[21]

Applying its conception of *NLRB* v. *Thayer Co.*, 213 F.2d 748 (1st Cir.) *certiorari denied* 348 U.S. 883, the majority below held that this misconduct did not necessarily justify the Board's finding that

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[18] The employee misconduct which gave rise to the discharges is described in detail in the Board's opinion, J.A. 65-74.

[19] These home demonstrations are characterized by the Trial Examiner and the Board as "disgraceful spectacles of mob proportions, with as many as 400, 500, and even 700 persons assembled." J.A. 249; 70.

[20] At the employment office groups "actively blocked, pushed, shoved, bumped, spat upon, tripped, kicked, and otherwise impeded the entrance of persons into the employment office." J.A. 72.

[21] This Court has already concluded that coercive conduct here involved was a violation of Sec. 8(b)(1)(A) United Auto Workers v. W.E.R.B., 351 U.S. 266, 270.

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77 employees who engaged in such conduct were not entitled to reinstatement. The majority then remanded the case to the Board for it to balance the strikers' misconduct against Kohler's alleged unfair labor practices in order to determine if reinstatement would effectuate the policies of the Act.

The majority declined to consider whether the employee misconduct constituted "cause" for discharge within the provision of Section 10(c) of the Act, because the Board had not specifically referred to the "cause" provision of Section 10(c) in denying reinstatement. Thus, implicit in the remand to the Board is the proposition that violent and coercive conduct which violates the substantive proscription of Sec. 8(b)(1)(A) does not necessarily constitute "cause" for discharge within the meaning of Sec. 10(c) of the Act.

A. The Legislative History of the Act Reveals That the Majority Below Ignored the Basic Intendment of Congress.

The legislative history of the 1947 amendments reveals that Congress intended conduct which restrains and coerces nonstriking employees to be, ipso facto, "cause" for discharge within the meaning of Sec. 10 (c). A Board finding that strikers have been discharged for acts of misconduct violative of Sec. 8(b) (1)(A) constitutes a finding that the discharges were "for cause" within the meaning of Sec. 10(c) precluding the reinstatement of such strikers.

The House Conferees discussed a number of cases, including *Indiana Desk Co.* v. *NLRB,* 149 F.2d 987, (7th Cir.) in which the Court reversed a Board decision ordering the reinstatement of individuals who had engaged in mass picketing, and *Berkshire Knit-*

ting Mills, 46 N.L.R.B. 955 *enfcd.* 139 F.2d 134 (3rd Cir.) *cert. denied* 322 U.S. 747, wherein the Board attempted to distinguish between "major and minor crimes" for the purpose of determining which employees were entitled to reinstatement. They concluded that the courts had then come to recognize "the rule that under the existing provisions of Section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct," and that cases such as *Berkshire Knitting Mills* had been overruled.

After concluding that in view of the Court's recognition of this principle "the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities and the violation of collective bargaining agreements for the protection of Sec. 7 were unnecessary,"[22] the Conferees pointed to the added mandate of Sec. 10(c) of the Amended Act as assurance that the Board and Courts would not revert to the practice or reinstatement in the case of employees who engaged in unprotected activity; stating:

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such

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[22] House Conf. Rep. No. 510, (H.R. 3020), 80th Cong., 1st Sess. pp. 38-39.

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reason is protected in specific terms in section 10(c)."[23]

The court below, by holding that violent and coercive conduct which violates the express proscription of Sec. 8(b)(1)(A) does not necessarily constitute "cause" for discharge within the meaning of Sec. 10(c) of the Act, ignores this legislative history.

The above-quoted legislative history reveals that Congress was concerned with employee activity of a coercive and violent nature, and enacted the "for cause" provision of Sec. 10(c) to explicitly preclude the Board from reinstating employees discharged because of engaging in such conduct.

B. The Decision of the Court Below Is in Conflict With Prior Decisions of This Court and With the Decisions of Three Other Circuits.

In *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, during a "sit-down" strike, by force and violence the striking employees denied the employer the use of the plant. The Board issued an order directing the Company to cease and desist from engaging in unfair labor practices and also directing the reinstatement of the sit-down strikers. Before this Court, the Board argued that it had the power to reinstate the strikers because of the employer's antecedent unfair labor practices which is precisely the argument advanced by the majority below in this case. This Court unequivocally rejected this argument in the *Fansteel case,* when the Court held,

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor

[23] *Ibid.* p. 59.

practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrong doers from its employ." (306 U.S. 253-254)

* * * * * * * * *

"The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes." (306 U.S. 257)

* * * * * * * * *

"There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land . . . The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure." (306 U.S. 257-258).

The *Fansteel* case preceded the 1947 amendments to the Act. By those amendments the Act explicitly for-

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bids resort to force and violence, placing force and violence out of the protection of Section 7 of the Act and specifically proscribing it in Sec. 8(b)(1)(A). Thus, the *Fansteel* principle now finds expression in the terms of the Act itself.[24] The decision of the Court below in this case, and the *Thayer* case, if it suggests the conclusion reached by the court below, are in irreconcilable conflict with the decision of this Court in the *Fansteel* case and with Section 8(b)(1)(A) which incorporates the *Fansteel* holding into the Act.

The declaration of policy in the amended Act (Sec. 1, 29 U.S.C., 151) states that "Elimination of such practices is a necessary condition to the assurance of the right herein guaranteed." Thus, Congress has declared the ploicies of the Act which the Board must effectuate. Neither the Board nor the Court can substitute their ideas of policy in conflict with those laid down by Congress.

The decision of the court below in this case and the *Thayer* case, if it suggests the conclusion reached by the court below, also are in conflict with the decisions of three other circuits. The Third, Fourth and Seventh Circuits have held explicitly that the Board does not have the power to direct the reinstatement of unfair labor practice strikers who have been discharged for violent and coercive misconduct during the course of a strike. *NLRB* v. *Clearfield Cheese Co.*, 213 F.2d 70 (3d Cir.); *NLRB* v. *Longview Furniture Co.*, 206 F.2d 274 (4th Cir.); *W.T. Rawleigh*

[24] As pointed out above, in the portion of this petition dealing with legislative history of the Act, the "for cause" provision of Section 10(c) is a limitation on the Board's power, not a grant of power to the Board.

Co. v. *NLRB,* 190 F.2d 832 (7th Cir.). In addition to the conflict between the Circuits, the Second Circuit in *NLRB* v. *Ford Radio & Mica Corp.,* 258 F. 2d 457, 464 (2d Cir.), has cited the Thayer case as holding:

> "If it was not a protected activity, then it is axiomatic that the employer, regardless of its motivation, may discharge the strikers and the Board is powerless to order reinstatement. E.g., N.L.R.B. v. Thayer Co., 213 F.2d 748, 752 (1st Cir. 1954)."

The Second Circuit's citation of the *Thayer* case in support of this proposition shows that the interpretation of *Thayer* by the majority below has not been generally accepted.

The decision by the majority below has introduced an element of confusion into an important area of the administration of the Act.

We submit that clarification of this confusion by this Court is needed.

To hold that it could effectuate the policies of the Act to reinstate employees who resort to violence, mass picketing and mob activities defeats the basic intendment of the Act to resolve labor disputes in a peaceful and orderly manner.

CONCLUSION

It is of basic importance to the administration of the Act that the Board be required to follow established principles of law—that its refusal to apply such principles to undisputed facts be condemned—not sanctioned—by the courts.

If the Board is permitted to ignore the Act and base inferences on suspicion and conjecture contrary to all

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the evidence, an employer who must conform to the Act cannot determine whether any course of conduct will be held lawful or unlawful. There is, in effect, no law upon which he may rely.

It is essential to effectuate the policies of the Act that an employer who has governed his conduct in accordance with the Act as clearly established by Congress and the courts be not penalized therefore in order to reward a union for conduct not only unconscionable per se, but in open and flagrant violation of the Act.

As Chief Judge Miller said in his dissenting opinion:

> "The Board found, however, on the basis of incidents relatively insignificant in comparison with the strikers' unlawful behavior, that Kohler had refused to bargain collectively with the Union, that it had discouraged union membership, and had engaged in other unfair labor prcatices. . . ." (Appendix A hereto, p. 20a)

and

> "On the basis of matters which I regard as trivia—feeble efforts of Kohler to protect itself against open warfare—the Board's order went largely against the employer. In ordering its enforcement, the majority opinion goes even further. I do not believe any purpose would be served by a detailed discussion of subjects not heretofore treated in this dissent; suffice it to say I disagree with the majority opinion. *Its refinements of reasoning do not impress me as sufficient to justify its reward of the Union* for unconscionable conduct. . . ." (Appendix A hereto, p. 24a).

We submit that the denial by the Board of procedural due process of law and the sanction thereof by the majority of the lower court; the decisions of federal questions by the Board and the majority of the lower court in conflict with the applicable decisions of this Court and the decisions of other Courts of Appeals on the same matter; and the importance of the questions herein presented call for the exercise of this Court's power of supervision.

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 898

KOHLER CO., *Petitioner*

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 15961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
KOHLER COMPANY, INTERVENOR

No. 16031

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KOHLER COMPANY, RESPONDENT

No. 16182

KOHLER COMPANY, a Wisconsin Corporation, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board

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Decided January 26, 1962

Mr. Joseph L. Rauh, Jr. and *Mr. Louis H. Pollak*, of the Bar of the Supreme Court of Connecticut, *pro hac vice*, by special leave of Court, with whom *Mr. John Silard* was on the brief for Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft and Agricultural Imple-

ment Workers of America, petitioner in No. 15961 and *amicus curiae* in No. 16182. *Mr. Harold A. Cranefield,* of the Bar of the Supreme Court of Michigan, on the brief for petitioner in No. 15961 and for *amicus curiae* in No. 16182, was presented to the Court *pro hac vice. Mr. Daniel H. Pollitt* also entered an appearance for petitioner in No. 15961.

Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, with whom *Messrs. Stuart Rothman,* General Counsel, National Labor Relations Board, *Dominick L. Manoli,* Associate General Counsel, National Labor Relations Board, *Samuel M. Singer* and *Allan I. Mendelsohn,* Attorneys, National Labor Relations Board, were on the brief for respondent in Nos. 15961 and 16182 and for petitioner in No. 16031.

Mr. Lyman C. Conger, with whom *Mr. William F. Howe* was on the brief, for intervenor in No. 15961, for respondent in No. 16031, and for petitioner in No. 16182. *Mr. Ellison D. Smith,* of the Bar of the Supreme Court of South Carolina, on the brief for intervenor in No. 15961, for respondent in No. 16031 and for petitioner in No. 16182, was presented to the Court *pro hac vice. Messrs. E. Riley Casey* and *Jerome Powell* also entered appearances for intervenor in No. 15961, for respondent in No. 16031, and for petitioner in No. 16182.

Before WILBUR K. MILLER, *Chief Judge,* and EDGERTON and BAZELON, *Circuit Judges.*

BAZELON, *Circuit Judge:* These are petitions for review and enforcement of an order of the National Labor Relations Board concerning a strike by Local 833, UAW-AFL-CIO, against the Kohler Company. The strike began on April 5, 1954, and was still unsettled when the Board issued its order on August 26, 1960. The dispute has a long and bitter history—more typical of "a bygone era"—which is set forth in detail in the Board's decision. *Kohler Co.,* 128 N.L.R.B. 1062 (1960). In this opinion we relate only those facts required to understand the issues we consider.

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I. The Board's Decision and Order

The Board found that a disagreement over contract terms and not Kohler's alleged refusal to bargain caused the strike, but that it was prolonged by such refusals on and after June 1, 1954. On that date Kohler granted a three-cent wage increase to non-striking employees working under the conditions specified in an expired contract, but failed to make a similar offer to the Union. The Board also found that Kohler subsequently refused to bargain in good faith in the following respects, among others: by unilaterally putting into effect a second wage increase; by discharging striking employees and transferring nonstriking employees without notification to or consultation with the Union; and by refusing to furnish wage information pertinent to the negotiations. The Board also determined that Kohler violated §§ 8(a)(3) and (1) of the Act by discriminatorily treating some employees and unlawfully discharging others because of their participation in strike activities. In addition, the Board found that after June 1, 1954, Kohler interfered with, restrained, and coerced its employees in the exercise of their right to join labor unions and bargain collectively by engaging in surveillance and anti-union espionage, evicting certain strikers from Company-owned dwellings, and other conduct violating § 8(a)(1) of the Act.

Having concluded that Kohler's unfair labor practices on and after June 1, 1954, converted what the Board thought had been an economic strike into an unfair labor practice strike, the Board issued a remedial order directing the Company, *inter alia,* to reinstate strikers replaced after the June 1 unilateral wage increase,[1] excepting, how-

[1] The order also directs the Company to offer strikers, who were discriminatorily evicted from Company-owned houses during the strike, immediate occupancy of the same or substantially equivalent premises; furnish the Union with incentive wage information; cease and desist from committing certain enumerated unfair labor practices; and post appropriate notices in its plant.

ever, employees discharged on March 1, 1955, for misconduct in connection with the strike.

II. Kohler's Petition for Review in No. 16182

In No. 16182 Kohler seeks review of the Board's adverse determinations. We think they are amply supported by the record considered as a whole and that Kohler's attack must fail.[2] Since we fully adopt the Board's anaylsis of the evidence on these matters, further discussion would serve no useful purpose.

III. The Union's Petition for Review in No. 15961

In No. 15961 the Union challenges the Board's refusal to reinstate seventy-seven employees discharged for misconduct. It alleges that the Board failed to balance that misconduct against the Company's unfair labor practices. This balancing, it contends, is required by the statutory command that the Board's remedy "effectuate the policies of the [Act] . . . ."[3] *National Labor Relations Board* v. *Thayer Co.*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).[4] The Union also contends that the Board should have found that Kohler failed, both in form and substance to bargain in good faith in the unsuccessful negotiations

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[2] Kohler contends, *inter alia*, that the Board should have dismissed the complaint on the ground that the UAW is not in compliance with Labor Management Relations Act (Taft-Hartley Act) § 101, 61 STAT. 146 (1947), because its trustees, who Kohler claims are "officers," have not filed non-Communist affidavits. We think this contention is laid to rest by *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264 (1956), and *National Labor Relations Board* v. *Illinois Malleable Iron Co.*, No. 13244 (7th Cir., Nov. 15, 1961).

[3] National Labor Relations Act § 10(c), 49 STAT. 454 (1933), 29 U.S.C. § 160(c).

[4] See also *National Labor Relations Board* v. *Kelco Corp.*, 178 F.2d 578 (4th Cir. 1949).

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which culminated in the 1954 strike and that the walkout was therefore an unfair labor practice strike, from its inception on April 5, 1954. In the absence of such a finding, the Board ordered reinstatement only of employees whose jobs were filled after June 1, 1954. Had it found that Kohler's unfair labor practices caused the walkout on April 5, it might have ordered reinstatement of all strikers replaced by non-strikers at any time during the dispute.[5] Moreover, if the *Thayer* doctrine is valid, the Board should have balanced Kohler's unfair labor practices against the discharged strikers' misconduct whether it occurred either before or after June 1, 1954.[6]

A. The Discharges for Misconduct

We first set forth the facts relevant to the Union's request that the Board be directed to reconsider its decision not to reinstate seventy-seven strikers discharged for misconduct. Their misconduct occurred in connection with three series of incidents.

First, forty-four discharges were based on participation in "belly-to-back" mass picketing ranging from presence on the picket line to a physical assault upon a non-striker. The Board found that from April 5 through May 28 this picketing prevented any person who did not have a Union pass from entering Kohler's plants. The second series of incidents involved demonstrations by large, jeering crowds outside the homes of non-strikers during the month of August, 1954. Some strikers who actively participated in the demonstrations and others who were merely present in the crowds were discharged. The third series of inci-

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[5] See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278 (1956); *National Labor Relations Board* v. *National Shirt Shops*, 212 F.2d 491, 494 (5th Cir. 1954).

[6] We assume without deciding that *Thayer* principles would not govern reinstatement of employees discharged during the time, if any, before the stoppage became an unfair labor practice strike.

dents took place near Kohler's employment office in December 1954 and January 1955 when a group of Union pickets hindered applicants from entering by blocking, pushing, and shoving some of them and by forcing others to walk around the pickets. Kohler discharged the participants.[7] The last two series of incidents accounted for twenty-one discharges.[8] The remaining twelve discharges were members of the Union's strike committee which the Board found instigated some of the misconduct.

The trial examiner found that some of these employees had been discharged for activity which did not constitute misconduct or which Kohler had condoned. Accordingly, he recommended their reinstatement. But the Board reversed the examiner's findings. We put aside the Union's attack upon the Board's reasons for reversal,[9] and turn to the Union's contention that, in any event, we should direct the Board to reconsider the reinstatement issue in light of the *Thayer* doctrine.

B. The Application of the *Thayer* doctrine

Thayer holds that where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determin-

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[7] The record does not show whether all or only some of the pickets were discharged.

[8] Some who participated in the mass picketing were also involved in these activities. They are included in the tabulation of those discharged for participation in mass picketing.

[9] The Union challenges the Board's reversal of the trial examiner's finding that physical presence at the home demonstrations, employment office picketing and on the mass picket line did not constitute "misconduct." That issue is discussed at note 16, *infra*.

The Union does not contest the Board's rejection of the condonation finding.

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ing whether reinstatement would effectuate the policies of the Act.[10] Those policies inevitably come into conflict when both labor and management are at fault. To hold that employee "misconduct" automatically precludes compulsory reinstatement ignores two considerations which we think important. First, the employer's antecedent unfair labor practcies may have been so blatant that they provoked employees to resort to unprotected action.[11] Second, reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union. *In the Matter of H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1605-06 (1956) (dissenting opinion). But sanctions other than discharge—criminal prosecutions,[12] civil suits,[13] union unfair labor practice proceedings[14] and the *possi-*

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[10] These policies are, *inter alia*, to "protect the right of employees to organize and bargain collectively" and to assure that labor organizations respect employer's rights and do not jeopardize the public safety. Labor Management Relations Act of 1947 (Taft-Hartley Act) §101, 61 STAT. 136, 29 U.S.C. § 141 (1958); National Labor Relations Act § 1, 4 9STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

Cf. Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270, 278-80, 284 (1956).

[11] See Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.REV. 319, 324 n. 24 (1951).

[12] See *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 268, 272-74 (1956); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 483, 513 (1939).

[13] *UAW* v. *Laburnum Corp.*, 347 U.S. 656, 657 (1954); *UAW* v. *Russell*, 356 U.S. 634 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957).

[14] Labor-Management Relations Act of 1947 (Taft-Hartley Act) § 101, 61 STAT. 141, 29 U.S.C. § 158(b) (1958). See, *e.g.*, *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 270-71 (1955).

bility of discharge—are available to prevent or remedy certain employee misconduct. Hart & Pritchard, *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV.L. REV. 1275, 1319 (1939). See also *Berkshire Knitting Mills*, 46 N.L.R.B. 955, 1001-03 (1943), *enforced*, 139 F.2d 134 (3d Cir. 1943), *cert. denied*, 322 U.S. 747 (1944). Hence automatic denial of the reinstatement prevents the Board from protecting the rights of employees, but may not be essential to the protection of legitimate interests of employers and the public. We conclude that the teaching of the *Thayer* case is sound and must be followed in order to assure the Board's compliance with the statutory command that its remedial orders effectuate the policies of the Act.

The record indicates that the Board disregarded the *Thayer* doctrine.[15] Despite exceptions taken by both the Union and the general counsel to the trial examiner's express refusal to follow *Thayer*, the Board's decision refers neither to the doctrine nor to the considerations it requires. On the contrary, the Board held that strikers who did not themselves obstruct applicants but were present at the employment office picketing could not be reinstated because they were engaged in unprotected activity.[16] That approach to formulating the remedy for an employer's antecedent unfair labor practice was specifically

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[15] It would also appear from the Board's action on the *Thayer* remand that it did not intend to follow that decision in the future. See *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1595 (1956).

[16] The Union attacks this finding, citing, *inter alia*, *International Ladies' Garment Workers Union* v. *National Labor Relations Board*, 99 U.S.App.D.C. 64, 237 F.2d 545 (1956). In that case, we held that the Board erred in imputing the misconduct of some employees on the picket line to other employees who were present but who did not participate in acts of misconduct. We express no opinion concerning the applicability of that case to the facts of the present case. We assume that on the remand in this case the Board will consider it in assessing the seriousness of the misconduct.

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disapproved by *Thayer*.[17] In ordering the Board to reconsider its determination not to reinstate certain employees who had engaged in unprotected acts of misconduct, the *Thayer* court reasoned that where the issue is simply whether a discharge was an attempt to coerce employees in the exercise of their rights under § 7, a finding that an employee was fired for participation in unprotected activity ends the inquiry; but where there has been an antecedent employer unfair labor practice, a finding that employees have engaged in unprotected activity is only the first step in determining whether reinstatement is appropriate.[18] We think that view of the Board's remedial powers is correct. See *National Labor Relations Board* v. *Thayer Co., supra; Republic Steel Corp.* v. *National Labor Relations Board,* 107 F.2d 472, 479-80 (3d Cir. 1939), *modified on other grounds,* 311 U.S. 7 (1940); *National Labor Relations Board* v. *Deena Artware, Inc.,* 198 F.2d 645 (6th Cir. 1952), *cert. denied,* 345 U.S. 906 (1953); *National Labor Relations Board* v. *Stackpole Carbon Co.,* 105 F.2d 167, 176 (3d Cir. 1939), *cert. denied,* 308 U.S. 605 (1939); *National Labor Relations Board* v. *Elkland Leather Co.,* 114 F.2d 221 (3d Cir.), *cert. denied,* 311 U.S. 705 (1940);

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[17] 213 F.2d at 753.

[18] The *Thayer* court referred to "well-behaved" picket lines in which 103 employees had participated and for which they had been discharged. Since peaceful picketing is protected activity, the court upheld the Board's reinstatement of these employees. But the court also directed the Board to reconsider its refusal to reinstate certain other employees who had engaged in admittedly unprotected acts of misconduct. It is this portion of the *Thayer* opinion, to which the character of the picket lines is not relevant, which we follow here.

National Labor Relations Board v. *Anchor Rome Mills*, 228 F.2d 775 (5th Cir. 1956).[19]

C. Application of the Discharge "for cause" provision of § 10(c).

In its brief and argument before this court, the Board urges that balancing union and employer misconduct is unnecessary here since § 10(c) precludes reinstatement of employees "discharged for cause."[20] It now contends that the acts of misconduct which it found were committed by

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[19] *Compare Mastro Plastics Corp.* v. *National Labor Relations* Board, 350 U.S. 270 (1955), *with Arlan's Department Store*, 133 N.L.R.B. No. 56 (Oct. 10, 1961). In *Mastro* the Supreme Court sustained reinstatement of employees who struck in response to their employer's "flagrant" unfair labor practices, even though the collective bargaining agreement contained a "no-strike" clause. In *Arlan*, the Board denied reinstatement under similar circumstances because the employer's unfair labor practices were not serious. Explaining its refusal woodenly to apply *Mastro*, the Board said:

> "The 'either or' or 'slot machine' theory of jurisprudence cannot be applied to labor relations. In this field lines between the licit and illicit can rarely be drawn clearly in advance. And in the penumbral areas which are omnipresent, there is no substitute for niceties in judgment. As the Supreme Court recently observed in Electrical Works v. NLRB, 366 U.S. 667, 674, 'However difficult the drawing of lines more nice than obvious, the statute compels the task.'" [133 N.L.R.B. No. 56 at p. 7.]

We think these considerations apply with equal vigor to our case where, as in *Arlan*, both sides have been at fault.

[20] Section 10(c) provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Labor Management Relations Act of 1947 (Taft-Hartley Act) § 101, 61 STAT. 147 (1947), amending National Labor Relations Act § 10(c), 49 STAT. 454 (1935), 29 U.S.C. § 160(c) (1958).

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the discharged employees constituted "cause." But in its decision the Board did not mention the "for cause" provision of § 10(c). Nor did it allude to factors which may be relevant considerations under that provision, such as the employer's unfair labor practices,[21] each employee's job history, and the relationship between the acts of misconduct and fitness for continued service.[22] Thus it clearly appears that the Board did not rely on § 10(c) in refusing reinstatement.

Ordinarily "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). We could sustain the Board's order upon a ground which it did not consider only if that ground were one "within the power of . . . an appellate court to formulate."[23] Clearly, whether these employees' misconduct constituted "cause" for discharge under § 10(c)—like the question whether death arose out of and in the course of employment under the Longshoremen's and Harbor Workers'

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[21] Brief for the National Labor Relations Board in Opposition to Certiorari in *Thayer Corp.* v. *National Labor Relations Board*, 358 U.S. 883 (1954), pp. 21-22.

[22] See Note, 32 N.Y.U.L.Rev. 839, 846-48 (1957); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1956); *National Labor Relations Board* v. *Kelco Corp.*, 178 F.2d 578, 582 (4th Cir. 1949). *Cf. Westinghouse Electric Corp.*, 26 Lab. Arb. 836 (1956); *Southern Bell Tel. & Tel. Co.*, 25 Lab.Arb. 85 (1955); *Southern Bell Tel. & Tel. Co.*, 26 LabArb. 515, 517 (1956); *Southern Bell Tel. & Tel. Co.*, 26 Lab.Arb. 29 (1956); *Lehigh Portland Cement Co.*, 34 Lab.Arb. 866 (1960); *Appleton Electric Co.*, 28 Lab.Arb. 249 (1957); *Glasgow Adrian Co.*, 25 Lab. Arb. 614 (1955); *Reynolds Metals Co.*, 25 Lab.Arb. 405 (1955).

[23] *Lee* v. *Kennedy*, —— U.S.App.D.C. ——, 294 F.2d 231, 234 (1961), citing *Securities & Exchange Comm'n* v. *Chenery Corp.*, *supra* at 88. See *National Labor Relations Board* v. *Lundy Mfg. Co.*, 286 F.2d 424 (2d Cir. 1960).

Act—is governed by "standards [which] are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as [a] 'question of law.' "[24] That determination lies within the special competence of the Board.[25] The Board failed to make it and we can-

See generally 4 DAVIS, ADMINISTRATIVE LAW § 30.03 (1958).

not supply it. Therefore, we cannot say that § 10(c) would prevent the Board from ordering reinstatement if it were to find that to do so would effectuate the policies of the Act.

D. The Board's Determination that Kohler Bargained in Good Faith during the 1954 Negotiations.

The Union's second contention, mentioned earlier, is that the Board's finding that Kohler bargained in good faith during the 1954 negotiations cannot be sustained because in making that determination the Board viewed the negotiations in isolation, ignoring the Company's pre-1953 history of anti-union activities and three unfair labor practices committed during the negotiations. We think that contention is sound.

1. The Board's finding that the successful negotiations in 1953 obviated consideration of Kohler's prior labor history.

The Board admitted that Kohler's pre-1953 attempts to prevent an independent union from gaining a foothold "could well lead to a finding . . . that . . . [Kohler] was

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[24] *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507-08 (1951).

[25] 93 CONG.REC. 6677-78 (1947) (remarks of Sen. Taft). Cf. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, *supra* note 23; *Swift & Co.* v. *United States*, 316 U.S. 216 (1942); *Allegheny Corp.* v. *Breswick & Co.*, 353 U.S. 151, 163-70 (1957).

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opposed to bargaining with any but a dominated union, and was particularly opposed to bargaining with the Charging Party." But the Board found that these inferences were "refuted" by Kohler's subsequent conduct. The Company signed a contract with Local 833 after fifteen months of negotiation, the issuing of an unfair labor practice complaint, and the setting of a strike deadline. Although, as the trial examiner pointed out, "one may question whether the Union . . . was particularly enamored with the . . . contract . . . ," a report in the Union newspaper described it in laudatory terms. Seven months after the contract was signed and after three months' negotiation and the fixing of another strike deadline, the Company granted a three-cent increase under the 1953 contract's wage reopening clause. "It [was] . . . against this background of two successful series of negotiations that the Board [viewed] . . . the 1954 negotiations."

We need not determine whether, viewed in isolation, the negotiations would support the Board's conclusion. We conclude that in the circumstances of this case, the Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954.

"A determination of good faith or want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination." *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (concurring opinion of Frankfurter, J.). Only compelling circumstances could justify disregarding the "antecedent" events in this record—repeated unlawful interference with employee's attempts to organize an independent union and public expressions of hostility to it.

Here, the Board relies upon the lengthy 1953 contract and wage negotiations to prove that Kohler had had a change of heart and decided to accept its obligations under the statute. But the course of these negotiations shows Kohler's resistance to the Union's demands was so great that it could be overcome only by calling a strike and filing an unfair labor practice charge. While adamant resistance is not inconsistent with good faith bargaining, neither are negotiations characterized by such resistance compelling evidence of a change of heart which warrants a disregard of prior history.[26]

But we need not decide whether the successful 1953 negotiating, standing alone, could provide a proper basis for ignoring past history. They do not stand alone. Kohler committed three unfair labor practices designed to frustrate the operation of the grievance procedure created by the very contract which resulted from those negotiations and which the Board relied upon to demonstrate that Kohler had taken a new outlook. These violations included two attempts to prevent the Union's chief steward from presenting grievances[27] and a refusal to supply information needed to process wage claims based upon the three-cent increase negotiated in August 1953.[28]

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[26] *Cf. National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F.2d 701 (4th Cir.), *cert. denied*, 340 U.S. 811 (1950); *Fetzer Television, Inc.*, 131 N.L.R.B. No 113 (May 29, 1961); *Fitzgerald Mills Corp.*, 133 N.L.R.B. No. 98 (Oct. 11, 1961).

[27] One attempt involved coercion, the other an offer of a reward.

[28] In discussing Kohler's coercion of the Union's shop steward, the Board did not say whether these actions reflected upon the Company's good faith during the 1954 pre-strike negotiations then in progress. Similarly, the Board found that Kohler's unlawful refusals to supply information—some of which the Union needed to formulate its incentive wage demands—did not provoke the 1954 strike or impede the negotiations which preceded it. But the Board again failed to say whether the refusals revealed a hostility to the

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Negotiation of grievances is part and parcel of the bargaining process because a collective bargaining agreement does not define all the rights and obligations of the employees and the employer. It is "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards . . . and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV.L.REV. 999, 1005 (1955). The parties anticipate that disputes will arise over the proper application of the standards spelled out in the contract and that unforeseen problems, not contemplated by the standards, will have to be resolved through negotiation.[39] For the adjustment of such matters, collective agreement establish grievance machinery. Its proper functioning is essential if the employees are to receive the benefits promised in the contract because it establishes "the autonomous rule of law" that assures that "disputes will be adjusted by reason guided by the light of the contract, rather than by force or fiat."[40] Clearly, the signing of a contract is only an initial step in the process of good faith bargaining. In light of Kohler's failure to maintain the integrity of that process, we think the 1953 negotiations do not constitute compelling reasons for disregarding "antecedent events."

We do not, of course, purport to assess the weight to be accorded these events. That is the Board's task.

Union which motivated Kohler's relatively inflexible stand at the bargaining table and thus prevented agreement. *Cf. National Labor Relations Board* v. *Booker*, 180 F.2d 727 (5th Cir. 1950). If the Board failed to consider these violations in determining whether the strike was caused by Kohler's alleged "surface bargaining," see *Fitzgerald Mills, Inc.*, 133 N.L.R.B. No. 98 (Oct. 11, 1961), the Board will have an opportunity to do so upon remand of these cases.

[39] *Id.* at 1003-07.

[40] *Id.* at 1007.

IV. *Conclusion and the Board's Petition for Enforcement in No. 16031*

Since we find the Board's order directing Kohler to take affirmative action and to refrain from engaging in enumerated unfair labor practices is supported by substantial evidence, the Board's petition for enforcement will be granted. So much of its order as denies reinstatement to seventy-seven discharged employees will be set aside and the case remanded for further proceedings in light of this opinion and for modification of the Board's order if necessary. Any order of the Board entered pursuant to our remand will be reviewable or enforceable, as the case may be, on petition to this court, in which event the record contained in the joint appendix in the present case may be used without reprinting, on the request of any party.

So Ordered.

WILBUR K. MILLER, *Chief Judge,* dissenting: The strike at the Kohler plants, which the Union began April 5, 1954, was still in progress on August 26, 1960, when the Board entered the order which is now before us on the parties' petitions for review and the Board's petition for enforcement. The fact that unlawful mass picketing and acts of violence immediately began is shown by the following quotation from the Board's decision and order:

> "From April 5 until May 28, 1954, except for 3 days early in May, Respondent's plant was 'SHUT DOWN LIKE A DRUM' by the mass picketing of up to 2,500 pickets.* The pickets stationed in front of the Respondent's plant moved in a double line along the sidewalk across the driveways and plant entrances, in both directions for 2 city blocks. In addition to the main picket line, another group of pickets formed in the roadway to meet groups of nonstrikers who approached the picket line to enter the plant. This advance guard, on a number of occasions, would physi-

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cally block, push, shove, and prevent the nonstrikers from entering the plant. In addition, when nonstrikers approached the plant entrances, the double line of pickets would close any space in the line, and engage in conduct that has been commonly called 'belly to back' picketing while the advance guard was attempting to prevent the nonstrikers from even reaching the picket line. Those other entrances to the plant not affected by the above described picketing, were also barred, and while the picketing at those gates was not conducted on the grand scale described above, it was nevertheless effective in preventing ingress to or egress from the plant. In many instances the pickets refused to permit entrance to the plant property despite requests of the police to let the workers into the plant, and on those occasions when nonstrikers were attempting to enter the plant the pickets yelled and shouted such things as 'Hold the line,' 'No one gets through,' and 'Go home scab, go home.'

"In addition to the foregoing, the Union also put into effect and maintained during this period a 'pass' system under which persons desirous of entering the plant, the main office, the employment office, or even the medical department were required to procure passes from the Union's strike headquarters some distance away.* **"

*"In its radio broadcast of April 19, the Union boasted that some 2,500 pickets walked in a double picket line extending for 2 blocks in front of the Respondent's plant.

**"Apart from those persons who obtained passes from the Union, only the office employees and supervisors were permitted to enter the plant property during the above-described period."

An order of the Wisconsin Employment Relation Board, entered May 21, 1954, prohibited this unlawful mass pick-

eting and other illegal conduct of the Union. When a proceeding to enforce that order was begun, the Union agreed on May 28 to comply with it. Kohler had refused to negotiate during the mass picketing, but negotiations were resumed June 1, 1954, pursuant to the Union's agreement to discontinue its unlawful practices. But on June 29, Kohler again broke off negotiations, and in his report the trial examiner found its action was justified by continued violence and vandalism for which the Union was responsible. In its decision and order the Board concurred.

In August, 1954, negotiations were resumed but were soon discontinued by Kohler because the homes of nonstriking employees were being "picketed" in what the trial examiner called "disgraceful spectacles of mob proportions." I quote from the examiner's "concluding findings:"

> "The evidence plainly justifies Respondent's assertion that the Union was encouraging the home demonstrations. The conduct involved was sufficiently serious to warrant Respondent in suspending negotiations while the conduct continued. Certainly, the demonstration, which had become widespread and which had reached scandalous proportions, constituted coercion and intimidation of nonstriking employees of the most flagrant type. It is therefore concluded and found that Respondent was justified in breaking off negotiations on August 18."

Although the trial examiner found "the Union was encouraging the home demonstrations,"—an understatement, I think—he held there was no evidence that any striker participated in those mob scenes at the direction or suggestion of the Union, and that certain of the dischargees who were present were discriminatorily discharged. But a majority of the Board held "the Respondent [Kohler] had a valid ground for discharging all those strikers who were identified as being present at the home demonstra-

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tions." Proceedings to enforce the Wisconsin Board's order, which also prohibited home picketing, were begun and as a result such conduct by the Union was enjoined on August 30. This ended the home picketing.

The next acts of violence were in the employment office picketing which occurred in December, 1954, and January, 1955. This activity was thus described by the Board:

> "The Respondent also relied on participation in the employment office picketing as a grounds for the discharge of some of the strikers now in issue. The employment office picketing occurred generally in December 1954 and January 1955. The scene of this picketing was the entrance to the employment office and the approaches to that entrance. The pickets, usually numbering from 15 to 25, normally did not form a picket line as such, but assembled in groups along the sidewalk in front of the employment office. On occasion, when the job applicants approached to enter the employment office building, some of the pickets, and on occasion all of the pickets, would interpose themselves between the approaching applicants and the entrance to the employment office. In many such instances the applicant either had to push their way through the pickets or walk around them, but in the latter event the pickets sometimes again shifted to interpose themselves between the applicant and the door. On many occasions the applicants could not make their way into the employment office until the Kohler Village Police came over and ordered the pickets to open up. Frequently there were instances when groups of pickets actively blocked, pushed, shoved, bumped, spat upon, tripped, kicked, and otherwise impeded the entrance of persons into the employment office.
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> "Chairman Leedom and Members Rodgers and Jenkins, constituting a majority of the Board, find that

where it has been shown on the record that the dischargees were present at those employment office incidents, the Respondent had valid grounds for discharging them. . . ."

On March 1, 1955, Kohler discharged 90 strikers because of misconduct in connection with the strike. In the General Counsel's complaint against Kohler, which initiated the case before us, he alleged that 78 of them had been discharged because of their union membership or activities or because they had otherwise engaged in concerted activities. But the Board found that these strikers were lawfully discharged because they had participated in and actively supported unlawful activities which intimidated non-strikers in the exercise of their legal rights.[1]

The Board found, however, on the basis of incidents relatively insignificant in comparison with the strikers' unlawful behavior, that Kohler had refused to bargain collectively with the Union, that it had discouraged union membership, and had engaged in other unfair labor practices. It ordered Kohler to bargain collectively with the Union, to furnish it with information concerning incentive earnings, and to offer all striking employees (except those found by the Board to have been lawfully discharged and except those who had been permanently replaced prior to June 1, 1954,[2]) immediate and full reinstatement to their former positions, and to make them "whole . . . for any loss of earnings which they may suffer by reason of Respondent's [Kohler's] refusal, if any, to reinstate them

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[1] Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) provides that

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . ."

[2] The significance of this date will be noted later.

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. . . ." The Board also ordered Kohler to offer certain striking employees, who had been evicted from living quarters owned by Kohler, immediate occupancy of their former quarters and to make them whole for any loss they might have suffered by reason of eviction.

In case No. 15,961, the Union seeks review of the portion of the Board's order which held the 78 dischargees had been lawfully discharged. It argues that the case should be remanded to the Board to determine whether reinstatement of the discharged strikers would effectuate the policies of the Act. Although Section 10(c) of the Act, 29 U.S.C. § 160(c), provides:

> ". . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause. . . .",

the Union contends the conduct of the discharged strikers should be compared with alleged unfair practices on the part of Kohler—in a sort of balancing of equities, I suppose; that, having made such comparison, the Board should determine whether reinstatement of the discharged strikers would effectuate the policies of the Act and, if it so determined, should order their reinstatement, despite the flat provision of Section 10(c).

In their opinion, the majority of the Court accept the Union's argument, and set aside "So much of its [the Board's] order as denies reinstatement to seventy-seven discharged employees[3] . . ." and remand the case to the Board for further proceedings. Among the bases for this ruling, my brothers cite *National Labor Relations Board* v. *Thayer Co.*,[4] saying, ". . . [T]hat view of the Board's remedial powers is correct." The majority dis-

[3] Whether this figure should be 77 or 78, I do not know.

[4] 213 F.(2) 748 (1st Cir. 1954).

regard Section 10(c) of the Act because, they say, ". . .[I]n its decision the Board did not mention the 'for cause' provision of § 10(c). . . . Thus it clearly appears that the Board did not rely on § 10(c) in refusing reinstatement."

I disagree. I do not think Section 10(c) can be disregarded in this fashion. And I do not read the *Thayer* opinion as support for the majority's decision. The facts are quite different. In the *Thayer* case 103 discharged strikers were ordered by the Board to be reinstated. The court said:

> ". . . It is undisputed that those employees who wished to continue working during the strike were able to do so. The Board and the trial examiner both drew the 'factual inference' that the pickets did not intend or seek to prevent employees from entering or leaving the plants.[5] There is substantial evidence on the whole record to support this finding. . . ."

In addition, in another place in its opinion, the *Thayer* court said, "The picket lines were fairly well-behaved, and nonstriking employees were able to enter and leave the plants without serious incident." It is apparent, therefore, that the Board did not find in the *Thayer* case, as it did here, that the strikers were guilty of unlawful violent conduct which was, as the majority say of this Union's conduct, typical of "a bygone era." Thus cause for discharge did not clearly appear, as it does here. There are some observations in the *Thayer* opinion as to the Board's duty to determine whether reinstatement would effectuate the legislative purpose in cases where cause for discharge did not appear. I do not regard those observations as persuasive; but, if they are sound, they have no application in a case such as this where cause for the discharges so clearly appears.

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[5] According to the Board, it was peaceful picketing.

Moreover, the *Thayer* court did not leave Section 10(c) out of consideration because the Board had not relied upon it, as do the majority in this case. It said, "The actual questions in this case are whether under the circumstances the strike conduct was cause for discharge, and *if not* whether reinstatement would effectuate the policies of the Act." (My emphasis.) This is a clear statement, I think, that if there was cause for discharge, the Board could not reinstate and, therefore, could not consider the question whether reinstatement would effectuate the legislative policies. It is also a clear recognition of the efficacy of the "just cause" provision of Section 10(c).

The strike which began April 5, 1954, was caused, the Board found, by a disagreement over contract terms, and not by Kohler's refusal to bargain which the Union alleged. But the Board also found that the strike was prolonged by Kohler's unilateral grant of a three-cent wage increase, which it said occurred June 1, 1954. Thus, after that date the continuance of the strike was held to be due to this alleged unfair labor practice on the part of Kohler. This is the significance of the date of June 1, 1954, which I promised in footnote 2 I would explain.

I do not think the Board had the right to make this finding. The complaint alleged and Kohler's answer admitted that the wage increase was put into effect on April 5, so there was no issue as to the date presented for decision. But, having found the strike was begun on April 5, without fault on Kohler's part, the Board said a unilaterally granted wage increase of three cents "disparaged the Union and the collective bargaining process, and clearly falls within the proscription of Section 8(a)(5) and (1) of the Act." This was held to convert the economic strike into an unfair labor practice strike.

Even if this small increase had been put into effect on June 1, 1954, it could not justly and fairly be regarded as disparaging the Union and the collective bargaining

process, in my opinion. The notion that the Union was ready on June 1, 1954, to settle the strike which began April 5, but was forced to prolong it by the unilateral grant of a three-cent wage increase on that day seems to me to be rather farfetched,—indeed, without foundation in reason.

The majority opinion does not discuss case No. 16,182, which is Kohler's petition for review. This omission is due, I suppose, to the fact that Case No. 16,031—the Board's petition for enforcement—which is discussed by the majority, is largely the reverse of Kohler's petition for review.

On the basis of matters which I regard as trivia—feeble efforts of Kohler to protect itself against open warfare —the Board's order went largely against the employer. In ordering its enforcement, the majority opinion goes even further. I do not believe any purpose would be served by a detailed discussion of subjects not heretofore treated in this dissent; suffice it to say I disagree with the majority opinion. Its refinements of reasoning do not impress me as sufficient to justify its reward of the Union for unconscionable conduct. I would deny enforcement in No. 16,031, deny the Union's petition in No. 15,961, and grant the request of Kohler's petition for review in No. 16,182.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Nos. 15,961, 16,031, 16,182

On Petitions to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

Judgment

These cases came on to be heard on the record from the National Labor Relations Board and on petitions to review and set aside, and a cross-petition for enforcement of, the order of the National Labor Relations Board herein, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed and will be enforced, except as to so much of the order as denies reinstatement to 77 discharged employees, which portion of the order is hereby set aside.

Pursuant to Rule 38(1) of this court the Board shall within 10 days serve upon the respondent and file with this court a proposed enforcement decree consistent with the opinion of this court and with this judgment.

It is Further Ordered by the court that the proceedings herein are hereby remanded to the Board for further proceedings with respect to the 77 discharged employees in light of the opinion of this court and for modification of its order if necessary.

Per Circuit Judge Bazelon.

Dated: January 26, 1962.

Separate dissenting opinion by Chief Judge Wilbur K. Miller.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,961

LOCAL 833 UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,
KOHLER COMPANY, *Intervenor*.

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

KOHLER COMPANY, *Respondent*.

No. 16,182

KOHLER COMPANY, a Wisconsin Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Motion For Leave To Adduce Additional Evidence

Comes now the Kohler Co., Respondent in No. 16,031 and Petitioner in No. 16,182, and respectfully requests leave to adduce additional evidence. The grounds for this motion are as follows:

1. Section 10(e) of the National Labor Relations Act, amended, (29 U.S.C. § 160(e)), provides in pertinent part—

> *"If either party shall apply to the court for leave to adduce additional evidence and shall show to the*

satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. . . ." (Emphasis added.)

The two tests for remand were summarized by this Court in *NLRB* v. *National Laundry Co.*, 138 F. 2d 589 (1943), as follows:

> "We must decide the case on the record certified by NLRB. The record does not contain the facts on which the company relies. Section 10(e) of the National Labor Relations Act provides means for supplementing the record. Either party may apply to the court for leave to adduce additional evidence, upon a showing that it is material and that there were reasonable grounds for failure to adduce it in the hearing before NLRB. . . ."

2. In this case the unfair labor practice complaint *inter alia* alleged that Respondent Kohler Co. granted a wage increase on April 5, 1954, which Respondent admitted by verified answer. Although the complaint was amended several times during the hearing before the Trial Examiner, it was not changed in that respect, and Respondent was not apprised that it was charged with violating the Act by deliberately making the wage increase on June 1,

1954 (and not on April 5, 1954) to undermine negotiations then resuming with the union, until the Trial Examiner found such a violation in his Intermediate Report. When the Board thereafter reopened the hearing the Board refused to allow the Respondent to present evidence conclusively showing that Respondent had granted the wage increase on April 5, 1954, and not on June 1, 1954, and, therefor, that it had not been timed to undermine the negotiations which commenced on June 1, 1954.

3. The evidence Respondent seeks to place in the record is contained in the Affidavits of Joseph Heule and L. L. Smith attached hereto and made a part hereof, including the "Bulletin for Supervision," dated April 5, 1954, appended to the Affidavits as Exhibit A.

A stipulation of the parties to the facts stated in the Affidavits and to the authenticity of document would obviate the need for further hearing by the Board. However, it may be noted, that there can be no compromise with the due process requirement that material evidence be admitted on the ground of expediency or convenience, or to avoid delay. *NLRB* v. *Donnelly Garment Co.*, 123 F. 2d 215, 224 (8th Cir. 1941).

4. The motion is properly before the Court because:

(a) The evidence Respondent seeks to place in the record is competent and material to the question whether Respondent violated the Act by effectuating a wage increase on June 1, 1954.

(b) Respondent was not apprised during the original hearing before the Trial Examiner that it was charged with violating the Act by granting a wage increase on June 1, 1954, which undermined negotiations with the union. Therefore, Respondent's failure to present the evidence at the original hearing was "reasonable" within the meaning of Section 10(e). *Swift & Co.* v. *NLRB*, 106 F. 2d 87 (10th Cir. 1939).

(c) When the Board reopened the hearing, after the issuance of the Intermediate Report, the Board arbitrarily refused to allow Respondent to present evidence to show that the date of the increase was April 5, 1954, and not June 1, 1954 as found by the Trial Examiner. Therefore, Respondent's failure to present the evidence at the reopened hearing was "reasonable" within the meaning of Section 10(e). *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 226 (1938); *NLRB* v. *Fairchild Engine Airplane Corp.*, 145 F. 2d 214, 215 (4th Cir. 1944).

(d) The motion, and remand, are necessary to rectify the Board's denial of due process required by the Fifth Amendment to the Constitution of the United States, which might be deemed waived by Respondent if it did not present this motion.

5. The Additional Evidence is Material

Although the complaint against Respondent did allege a wage increase on April 5, 1954 and did not allege the granting of any wage increase on June 1, 1954, in his Intermediate Report the Trial Examiner found that a three-cent increase, which had been offered to and rejected by the union prior to the strike,[1] had been effectuated on June 1, 1954, and stated,

> "Certainly, there was no conversion prior to June 1, as no unfair labor practices of any kind were found to have been committed between April 5 and that date. It has been found, however, that on or about June 1, Respondent failed to bargain in good faith by its unilateral grant of a wage increase (Section E, 1). That action, which was 'manifestly inconsistent with the principle of collective bargaining' (Crompton-Highland Mills, supra, at p. 225), resulted in disparagement of the Union as the bargaining repre-

[1] 128 NLRB 122, p. 7, ll. 17-24.

sentative of Respondent's employees and prejudiced the rest of the negotiations. Id. and see NLRB v. J. H. Rutter-Rex Mfg. Co., Inc., 40 LRRM 2213, 2215. Respondent's unfair labor practice thus increased and exacerbated the differences between the parties, which during the June negotiations were close to solution. The failure to reach agreement, which the evidence plainly shows caused the strike to be prolonged, is chargeable to that unfair labor practice."[2]

And, also referring to the June negotiations, the Trial Examiner stated:

> "The wage issue was one on which negotiations were being resumed, but Respondent by its secret unilateral action deprived the Union both of opportunity to consider the increase and of obtaining any share of the credit or reward for its granting. . . ."[3]

The Board approved the Trial Examiner's finding that the wage increase was granted on June 1, 1954,[4] as well as his assumption that the increase then was granted to prejudice the negotiations which then were resuming, after a lapse of a couple of months.[5]

The materiality of the date is emphasized in the following extract from the Board's decision:

> "Having found, as did the Trial Examiner, that the unilateral wage increase was put into effect on or about June 1, an issue remains as to whether or not this violation of Section 8(a)(5) and (1) of the Act prolonged the strike and converted it to an unfair

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[2] Intermediate Report, p. 132, 11. 33 to 46, incl.

[3] Intermediate Report, p. 29, 11. 25-28.

[4] 128 NLRB 122, p. 24, 11. 6-11; p. 27, 1. 4.

[5] 128 NLRB 122, p. 27, 11. 11-13; p. 28, 11. 1-5.

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labor practice strike. The Trial Examiner found that it did. Contrary to the exceptions of the Respondent, we agree.

"Here the wage increase was given on or about the very time that the parties were renewing negotiations. Moreover, the issue of wages, one of the major issues separating the parties, was one on which negotiations were being resumed. To secretly and unilaterally grant the wage increase at that moment was manifestly inconsistent with good-faith collective bargaining. It disparaged the Union as the bargaining representative of Respondent's employees at a critical time when the plant was reopening and when the parties were resuming negotiations."[6]

Furthermore, the date when the increase was *actually* put into effect—April 5, 1954—was during the period (April 5 to June 1) when, as the Trial Examiner found,[7] the company's obligation to bargain was suspended by the union's mass picketing and other flagrantly unlawful conduct. A finding approved by the Board.[8]

6. There Were Reasonable Grounds For Respondent's Failure To Present The Evidence At The Original Hearing

(a) *The Pleadings Presented No Issue Regarding The Date Of The Increase*

The Complaint charged that:

"On or about April 5, 1954, the Respondent put into effect a wage increase without any negotiation with, consultation with or notice to the union. . . ."[9]

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[6] 128 NLRB 122 at p. 27.

[7] Intermediate Report, p. 34, 11. 15-18; Also n. 29, p. 34.

[8] 128 NLRB 122, p. 3, 11. 1-2.

[9] G.C. Ex. 1-L, para. 9(a), p. 4; 128 NLRB 122, p. 25, 11. 8-9.

Despite several amendments to the Complaint during the original hearing this allegation was left unchanged, and, as the Board concedes, Respondent in verified answers admitted that the wage increase was placed in effect on April 5.[10]

The Board's rules provide—

> "All allegations in the complaint, if no answer is filed, or any allegation in the complaint *not specifically denied* or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, *shall be deemed to be admitted to be true* and shall be so found by the Board . . ."[11] (Emphasis added.)

Respondent was entitled to rely on the Complaint and the Board Rule to define the issues Respondent was litigating and to eliminate any necessity for proving by evidence that the date for the wage increase was April 5, 1954. And it should be noted that Section 10(b) of the Act (29 U.S.C. § 160(b)) provides that,

> "Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. . . ."

There was no reason for Respondent to litigate the question whether it had effectuated a wage increase on June 1, 1954 in violation of the Act because Respondent was not apprised that any such issue existed.

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[10] 128 NLRB 122, p. 24, ll. 12-14; p. 25, ll. 13-14; G.C. Ex. 1-H, para. 6, p. 2; G.C. Ex. 1-LLL, para. 7, p. 2.

[11] NLRB Rules & Regulations, Series 8, p. 5, § 102.20.

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(b) *The Fact that During the Hearing Respondent's Witnesses Were Questioned Concerning the Date of the Increase Did Not Place the Alleged Violation of June 1, 1954 In Issue.*

During the original hearing Respondent's witnesses, H. V. Kohler and L. C. Conger, were questioned concerning the date of the wage increase, but the testimony did not establish any specific date.

This questioning did not suffice to place in issue any allegation that Respondent had violated the Act by granting a wage increase on June 1, 1954 to prejudice the resumed negotiations. *NLRB* v. *Kanmak Mills,* 200 F. 2d 542 (3rd Cir. 1952). In the *Kanmak* case the unfair labor practice complaint alleged that the employer had violated Section 8(a)(3) by refusing to reinstate an employee because of union activity. Based upon the testimony of a witness for the employer the complaint was amended at the close of the hearing to allege that the refusal to reinstate was because unfair labor practice charges had been filed by the employee, and violated Section 8(a)(4). The Board found such a violation. The Court reversed that conclusion and remanded the case for a rehearing on the merits of the violation as alleged in the amended complaint. The Court stated:

> "It is true that the Board and the examiner relied on testimony of respondents' witness, the manager. It is further true that respondents at no time made an offer of specific testimony which they intended to produce to show they were not guilty of conditioning the rehiring of Miss Petrovich on her retraction of charges against them. But those reasons cannot foreclose respondents' right under the Administrative Procedure Act (Section 5(a) (b), 5 U.S.C. Section 1004), and generally, to be given timely notice of the charge and to have an opportunity to contest it.

Section 8(a)(4) alleged in the amendment to have been violated by respondents, specifically concerns discharges based on the employee's filing charges against the employer with the Board or testifying in Board proceedings. It was entirely new to the Petrovich claim. Respondents were entitled to answer it even though its foundation was the evidence of their own witness which was given in the course of his testimony with reference to the original charge." (200 F. 2d 542, 545)

In this case, after it was informed by the Intermediate Report that it was charged with a violation not alleged in the Complaint, the Respondents made repeated offers of evidence to rebut the new charge. In this case the Complaint never was amended to give Respondent any notice of the entirely new allegation that it had violated the statute on June 1, 1954.

(c) *At the Close of the Hearing All Parties Proceeded on the Understanding that the Wage Increase Had Been Made on April 5, 1954.*

Furthermore, after the original hearing was closed, the Union, in its brief to the Trial Examiner, stated:

"Nevertheless Respondent on April 5, 1954, *the first day of the strike,* put into effect a .03 per hour wage increase which it didn't even bother to inform the Union of. G.C. Ex. 1-P; Tr. 733. . . ." [12]

In his brief to the Trial Examiner, Counsel for the General Counsel stated:

"On April 5, Respondent unilaterally granted a wage increase to the employees in the unit (G.C. Ex. 1-P)" [13]

[12] Brief of Charging Party before Trial Examiner, April 20, 1957, p. 15.

[13] Brief to Trial Examiner on behalf of Counsel for the General Counsel, April 19, 1957, p. 55.

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It is evident, therefore, that after the close of the original hearing, neither Council for the General Counsel nor Counsel for the Union (the Charging Party) made any attempt to place in issue a charge that Respondent had violated the Act by making a wage increase on June 1, 1954.

In this connection *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938) is pertinent. *Inter alia*, in that case, the company and the union challenged the validity of a Board Order invalidating contracts between the company and the union on the ground that the issue of the validity of the contracts was not actually litigated before the Board. The court concluded that the record supported that contention, stating:

> "The argument to the contrary, that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that 'no issue of representation (was) involved in this proceeding;' and that the Board took the position that the Brotherhood was 'a bona fide labor organization' whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding

on the basis that the validity of the contracts had not been assailed." (305 U.S. at pp. 234-235)

In this case the complaint was never amended and Counsel for the General Counsel following the close of the hearing made no contention that Respondent deliberately had timed a wage increase to prejudice the negotiations which commenced at the beginning of June, 1954. The Trial Examiner selected that date and, in effect, amended the complaint without affording Respondent any opportunity to present evidence on the issue he created.

(d) *No Date Other Than April 5, 1954 Was Established At the Oral Argument Before the Trial Examiner.*

At the oral argument, months after the close of the hearing, the Trial Examiner questioned counsel for the parties concerning the date of the increase. The discussion was inconclusive, and when it was ended the Trial Examiner commented:

"After all, it is pretty much of a matter in view of record and admission of counsel here, it is a matter of pulling a date out of the hat." (Tr. 19,468)

Then the following colloquy took place regarding the Trial Examiner's questions to Respondent's counsel:

"Mr. Rabinovitz: Mr. Examiner, may I ask a question? These questions you are asking of Mr. Conger, these factual questions, I assume there is no chance of cross-examination.

"Trial Examiner: He is not testifying now. This is lawyer's talk.

"Mr. Rabinovitz: But you asked him some factual questions. I assume that is all part of the lawyer's talk.

"Trial Examiner: To the extent his answers vary from the record, they will be given no weight what-

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ever. He is not under oath. He is not testifying. He is arguing." (Tr. 19,468-69)

The Trial Examiner must be taxed with knowledge that the complaint and answer, which framed the matters being litigated, fixed the April 5, 1954 date and that the complaint did not charge Respondent with violating the Act by making a wage increase on June 1, 1954. Presumptively, the Trial Examiner was aware that the case had been briefed to him on that basis.

At the oral argument neither the Counsel for the General Counsel nor the Trial Examiner proposed any amendment to the complaint, to apprise Respondent that it was being charged with a new unfair labor practice which had not been in issue and had not been litigated.

It is apparent from the Trial Examiner's statements, which we have quoted, that there was no stipulation that the date of the wage increase, in fact, was June 1, 1954 and not April 5, 1954, and that the Trial Examiner was not soliciting testimony.

If the Trial Examiner intended to introduce a charge that Respondent unlawfully had timed a wage increase on June 1, 1954, under the circumstances it was incumbent upon him to secure amendment of the complaint and give notice to Respondent. *Cf., Consolidated Edison Co.* v. *NLRB, supra.* Instead, the Trial Examiner, without proper notice to Respondent, elected to use the Intermediate Report as a medium for changing the complaint and for finding Respondent guilty of a new statutory violation without any opportunity for hearing. *Cf., NLRB* v. *Kanmak Mills, supra.*

(e) *The First Notice Respondent Had That It Was Charged With Violating the Act Because It Granted a Wage Increase at the Commencement of the Negotiations in June 1954 Was by Means of the Intermediate Report. Thereafter, the Hearing Was Reopened and the Board Arbitrarily Refused to Allow Respondent to Present Evidence to Show That the Date of the Increase Was April 5, 1954, and, Therefore, Was Not Timed to Undermine the June Negotiations.*

As we have shown, in his Intermediate Report the Trial Examiner found that the Respondent evidenced bad faith and violated the Act by deliberately effectuating the three-cent wage increase on June 1, 1954.

After the Intermediate Report, but before the matter had been heard by the Board, the parties filed motions to reopen for the introduction of additional evidence. *Inter Alia,* the Company requested the Board to permit it to introduce evidence at this reopened hearing to establish that the date of the increase was April 5, 1954.

The Board granted the motions except for Respondent's motion relating to the date of the three cents per hour wage increase. The Board, by Frank M. Kleiler, Executive Secretary, denied this, holding that such evidence "cannot be considered evidence which was unavailable to Respondent at the time of the hearing before the Trial Examiner."[14]

Respondent moved for reconsideration pointing out that the question was not whether such evidence was available but "would such evidence, if offered, have related to any issue before the Trial Examiner" and "Did Respondent have any notice or reason to believe that there was any issue as to the actual date of the increase or that such date was in any way material to any issue before the Exam-

[14] G.C. Ex. 1-QQQQQ, p. 2.

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iner."[15] Respondent urged that refusal to accord it fair opportunity to litigate the issue would deny Respondent due process of law.

This motion was denied by telegram from the Board, Frank M. Kleiler, Executive Secretary.[16]

At the reopened hearing Respondent stated its intent to make an offer of proof of the evidence it wished to submit "to keep the record" and suggested that the examiner accept an offer of proof and reject the proof (thereby preserving the record and incorporating the rejected evidence in the record for possible further consideration by the Board and the courts).

This offer of proof was denied.[17]

7. The Due Process Clause of the Fifth Amendment to the Constitution of the United States Requires the Receipt of the Evidence.

(a) *Respondent Was Entitled to Know Specifically the Complaint To Be Met and To Have a Hearing on the Issues Presented.*

When the Trial Examiner issued his Intermediate Report, as we have shown, there was no complaint that Respondent had violated the Act by making a wage increase on June 1, 1954 (and not on April 5, 1954 as alleged in the complaint and admitted by answer), to undermine the pending negotiations. Respondent had not been provided with any notice of, or opportunity to litigate, such an issue.

Respondent, therefore, was denied due process of law. *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (7th Cir. 1951); *NLRB* v. *Fulton Bag & Cotton Mills*, 175

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[15] G.C. Ex. 1-SSSSS.

[16] G.C. Ex. 1-UUUUU—See also Supplemental Intermediate Report, p. 8, 11. 15-16.

[17] Transcript, pp. 19,772—19,773.

F. 2d 675, 677 (5th Cir. 1949); *NLRB* v. *Reliable Newspaper Delivery Inc.*, 187 F. 2d 547, 550 n. 4 (3rd Cir. 1951). As stated in the *Bradley Washfountain* case, *supra:*

> "Of course anyone charged with violation of the law is entitled to know specifically what complaint he must meet and to have a hearing upon the issue presented, and, were what we have said in this respect the only factual or legal question involved, we would necessarily agree with respondent's position. There is a denial of procedural due process of law when the issues are not clearly defined and the employer is not fully advised of them. Consolidated Edison Company v. N.L.R.B., 305 U.S. 197. . . ." (192 F. 2d at p. 149)

(b) *When the Board, After Reopening the Hearing, Refused to Allow Respondent to Present Evidence to Show the Date of the Wage Increase Was April 5, 1954 the Board Acted Arbitrarily.*

The Board's refusal to allow Respondent, notified for the first time by the Intermediate Report that it was charged with violating the Act by reason of an alleged wage increase on June 1, 1954, to present evidence material to rebut that charge, under the circumstances, was arbitrary and denied Respondent due process of law. *Consolidated Edison Co.* v. *NLRB, supra; NLRB* v. *Burns & Gillespie,* 207 F. 2d 434, 436 (8th Cir. 1953) in which the Court held:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is

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entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15; Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F. 2d 611, 621." (207 F. 2d at p. 436)

(c) *Remand Pursuant to Section 10(e) is Necessary to Rectify the Board's Denial of Due Process.*

It has been indicated that where a respondent in an unfair labor practice proceeding fails to invoke the remedy provided by Section 10(e) to rectify an arbitrary Board refusal to admit competent, material evidence, the reviewing court is without power to direct the taking of the evidence or to deny enforcement of the Board order for failure to receive it. *NLRB* v. *National Laundry Co.*, 138 F. 2d 589 (C.A.D.C. 1943); *NLRB* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214 (4th Cir. 1944); *Wilson & Co.* v. *NLRB*, 156 F. 2d 577 (10th Cir. 1946); and, see also, *Consolidated Edison Co.* v. *NLRB, supra.* Therefore, failure to apply under Section 10(e) waives denial of procedural due process.

Respondent is before the Court to secure the remedy which the Act provides to rectify the Board's denial of due process.

CONCLUSION

For all of the foregoing reasons Respondent submits the case must be remanded to the Board pursuant to Section 10(e) of the Act so that the evidence may be made a matter of record, and for further proceedings required by the Act.

Respectfully submitted,

WILLIAM F. HOWE
JEROME POWELL
E. RILEY CASEY
Attorneys for Respondent
KOHLER CO.

OF COUNSEL:

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Columbia, South Carolina

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State of Wisconsin
County of Sheboygan, ss.

JOSEPH HEULE, being first duly sworn on oath, deposes and says that:

He is head of the Payroll Department of Kohler Co. and has held that position since February of 1952.

His duties include charge of the computation and payment of wages to all factory employees of Kohler Co.

On or about the 5th day of April, 1954, he received a copy of "Bulletin For Supervision, April 5, 1954" attached hereto as Exhibit A.

In accordance with that bulletin and other instructions he has, since April 5, 1954, and specifically including all wages paid on May 6, 7 and 8, 1954, added 3¢ per hour to the computation of wages for all employees in the Kohler Co. factory and has made payment of wages to all said employees including said 3¢ per hour wage increase.

That he was not instructed on or about June 1, 1954, to effectuate any wage increase and did not effectuate any wage increase on or about June 1, 1954.

JOSEPH HEULE

Subscribed and sworn to before me this 14th day of April, 1961.

EDWARD J. HAMMER
Notary Public, Sheboygan
County Wisconsin
My commission expires
Permanent.

State of Wisconsin
County of Sheboygan, ss.

L. L. SMITH, being first duly sworn, deposes and says that on April 5, 1954, he was Vice President of Kohler Co., a Wisconsin corporation, and was in charge of public relations, that on April 5,, 1954, the "Bulletin For Supervision", Vol. 3, No. 54, April 5, 1954, attached hereto marked "Exhibit A", was prepared under his supervision and direction and was sent to over 300 individuals who were members of the supervisory organization of Kohler Co.

L. L. SMITH

Subscribed and sworn to before me this 20th day of April, 1961.

EDWARD J. HAMMER
Notary Public, Sheboygan
County Wisconsin
My commission expires
Permanent.

EXHIBIT A

Vol. 3 No. 54 April 5, 1954

FOR YOUR INFORMATION

Effective today (April 5) all employees in the bargaining unit who report for work will receive the 3¢ per hour wage increase.

Since negotiations with the union have reached an impasse, we are putting this increase into effect.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960
No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
KOHLER COMPANY, INTERVENOR.

No. 16,182

KOHLER COMPANY, a Wisconsin Corporation, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

No. 16,031

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

KOHLER COMPANY, RESPONDENT.

Before: Bazelon, Fahy and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of Kohler Company for leave to adduce additional evidence, of the objections thereto and of the reply to the objections, it is

ORDERED by the court that the motion for leave to adduce additional evidence is denied.

PER CURIAM.

Dated: May 22, 1961

APPENDIX C

Constitution of the United States

Amendments

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Relevant Provisions of the National Labor Relations Act, as amended (61 Stat. 136.29 U.S.C. 151, et seq.) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute

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financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9 (f), (g), (h)], and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or

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international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

• • • • • • • • • •

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question

determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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NLRB Rules & Regulations, Series 8, 29 C.F.R. Sec. 102.20 (1959)

SEC. 102.20 *Answer to complaint; time for filing; contents; allegations not denied deemed admitted.*—The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

APPENDIX D

Excerpt from Charging Party's Brief to Trial Examiner, dated April 20, 1957, p. 15

"Nevertheless Respondent on April 5, 1954, the first day of the strike, put into effect a .03 per hour wage increase which it didn't even bother to inform the Union of. G.C. Ex. 1-P; Tr. 733."

Excerpt from General Counsel's Brief to Trial Examiner, dated April 19, 1957, p. 55

"On April 5, Respondent unilaterally granted a 3¢ wage increase to the employees in the unit (G.C. Ex. 1-P)."

APPENDIX E

Excerpt from Memorandum Opinion of Circuit Court for Sheboygan County, Wisconsin, May 25, 1955 (Respondent's Ex. 90, p. 11)

"The Court is of the opinion, therefore, that Local 833 disobeyed and failed to obey the order or judgment of this Court entered on September 1, 1954, and was, therefore, in contempt of this Court."

APPENDIX F

KH44 GOVT PD-FAX TD MW PWS WASHINGTON DC DEC 12, 1958 139 PMC
LYMAN C. CONGER AND EDWARD J. HAMMER, CARE KOHLER CO.
RE KOHLER COMPANY, 13-CA-1780. RESPONDENTS MOTION FOR RECONSIDERATION OF THE BOARDS REMAND ORDER AND TO PERMIT EVIDENCE TO BE TAKEN IN REGARD TO THE THREE CENT PER HOUR WAGE INCREASE IS HEREBY DENIED, AS THE MOTION PRESENTS NO MATTER NOT PREVIOUSLY CONSIDERED BY THE BOARD.

FRANK M. KLEILER, EXEC. SECY.
NATIONAL LABOR RELATIONS BOARD

APPENDIX G

Pertinent Excerpts From Charge Filed July 12, 1954

2. Basis of Charge of Unfair Labor Practice

a—After strong and determined opposition from the company-employer, the union, Local 833, UAW CIO, won an election and was certified by the National Labor Relations Board in June, 1953. Previously, in April of that year the company caused the discriminatory discharge of a number of employees and thereafter, the company was

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charged and found guilty of an unfair labor practice charge. (Cases No. 13-CA-900; 13-CA-1114; 13-CA-1115). The Board issued an order on April 12, 1954, directing the company to cease and desist from further engaging in unfair labor practices, with which order the company has failed and refused to comply.

b—The company and the union, after five months of negotiations, following certification entered into a contract, which contract after notice expired March 1, 1954.

c—In the mid-fall of 1953, preparatory to negotiations for a new contract, the union requested that the company furnish it with a statement of the average earnings for workers in the various production departments while employed under the incentive system. The company refused to furnish this relevant information, and while demands on the part of the union have continued to this date, the company has continued to refuse to furnish this information.

d—In November of 1953, the union filed a grievance with respect to the transfer of an incentive worker to a lower rated day work job, demanding that he receive his incentive standard pay. The company in response stated that if the union insisted on enforcing this part of the contract, the company would change its policy and send the employees home when there was no work on the regular incentive job, thereby threatening the employees with reprisals because of their adherence to the contract. That the company has to this date reiterated the same position and made similar threats.

e—In order to assist in bargaining, the union on December 18, 1953, requested that the company furnish it with departmental seniority lists, which lists are in the sole possession of the company; the company however refused to supply such lists, and although demand has been made since February 1, 1954, and thereafter, the company has continued to refuse to supply such departmental seniority lists.

f—The company since February 1, 1954, and prior thereto, discriminated against members of the union through the means of unilateral merit increases.

g—On February 1, 1954, and thereafter the union presented a number of contract demands on such matters as seniority, arbitration of grievances, pensions, insurance and wages, but that the company failed and refused to reply to such demands and instead presented proposals which were less than the employees worked under in the contract then about to expire.

h—On or about February 28, 1954, the union requested that Mr. Herbert V. Kohler, president of the company, personally participate in the negotiations; Mr. Kohler rejected such request and has not at any time participated in the negotiations; that he further stated among other things, that as long as the union continues to insist what he termed "extreme and unrealistic demands" the present deadlock would continue. That at the same time Mr. Kohler accused the union that it is interested only in increasing its power and that therefore there is no point in engaging in negotiations. That each of such accusations were false and that Mr. Kohler knew they were false, and that Mr. Kohler made them solely for the purpose of discrediting the union and otherwise discouraging employees from becoming or remaining members of the union.

i—On March 17, 1954, the company, after refusing to make any change in their sub-standard offer of a contract, and after refusing to modify its position on the major issues previously referred to, walked out of the negotiations and refused to participate further.

j—That on or about April 2, 1954, the company invited the union to call a strike, and that at the same time it notified its employees that the company would not yield and that its stand calls for a strike; that upon a number of occasions it repeated its position that this show-down must

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come and it is glad it came now, rather than agree to union demands.

k—On April 5, 1954, the union, following a vote by the membership, voted overwhelmingly to engage in a strike.

l—Since the commencement of the strike, the company has made promises to diverse persons, including school boys, in order to recruit them for employment.

m—On April 15, 1954, the company filed a charge with the Wisconsin Employment Relations Board, seeking to enjoin the union from engaging in picketing the company plant.

n—On April 30, 1954, the company petitioned the Circuit Court of Sheboygan County for permission to join with non-striking employees in their suit against the union, seeking to enjoin and restrain the union from engaging in picketing and other concerted activities.

o—The company, through its president, Herbert V. Kohler, admitted the possession and the presence upon the premises of the company plant, guns, clubs and other forms of ammunition, as a means of interfering with, restraining, coercing, or discouraging the employees in the exercise of their rights to engage in concerted activities.

p—A few days thereafter, on or about May 30, 1954, the sheriff of Sheboygan County removed from the company premises the ammunition including tear gas, heretofore kept by the company as a means of coercing the employees, and as a threat of reprisal upon them.

q—On or about May 28, 1954, the company, through its authorized representative, stated openly that the company was not interested in engaging in bargaining, but was interested in learning each day, and particularly Monday mornings, how many employees would walk through the picket lines, and how many are supporting the demands of the union; that the company, he stated, did not believe a

majority of the employees were in support of the union demands, thus continually challenging the right of the union to represent the employees.

r—Since the commencement of the strike the company has issued public statements that it will continue what it states to be "its firmness" in the stand it has taken, seeking as its single objective to break the union.

s—The company has permitted, with the full knowledge and consent of its supervision, to let hang in one of its departments an effigy of the president of the local union, Allan Graskamp, and that such hanging effigy had a knife stuck in its back.

t—The company on June 29, 1954, publicly made wild, unfounded, defamatory, scurrilous, libelous, damaging and scandalous statements to the press and otherwise charging the union was responsible and was involved in alleged acts of violence taking place the night previously and that at the same time, the company let it be known that it would no longer engage in bargaining with the union; and that then and there the company walked out of the negotiations. That the company knew the charges were false.

u—The company at the meeting with union representatives threatened the union that it would shortly at its own expense, without limits as to funds, start a back to work movement, for the single purpose of breaking the strike and union.

v—That company's entire conduct is calculated to and fixed towards the objective of breaking the union and thus to deprive the employees of representation to which they are entitled under the Act.

w—That the company by its aforesaid acts and others, has interfered with the employees' right to self-organization, to remain members of and assist the local union, in its right to engage in collective bargaining through their own chosen representatives, and to engage in concerted

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activities for the purpose of collective bargaining and other mutual aid and protection.

x—That the company has further restrained and coerced its employees in the exercise of their rights guaranteed under the law.

y—That the company by these and other acts seeks to discourage membership or assistance to the union.

z—That the company by these and other acts has refused to engage in bona fide collective bargaining with the legally certified bargaining representative, Local 833 UAW CIO.

Wherefore the Union prays that a complaint charging the company with unfair labor practices be issued, to the end that it be found guilty of such charges, and further be restrained from continuing this course of conduct in full violation of the law:

And Further the Union prays that the National Labor Relations Board, pending hearing upon these charges, invoke appropriate Section of the Labor Management Relations Act and through such means petition the United States District Court for an order to enjoin and restrain the company from engaging in unfair labor practices, to cease and desist from such unfair labor practices, and to take such affirmative action, including to forthwith engage in bona fide collective bargaining with the union, to the end that a contract mutually agreed upon may be arrived at and the strike settled.

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Harvey Kitzman
Regional Director,
Region 10 UAW CIO

July 8th, 1954.